Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Director, California Department of Corrections,
Petitioner,
v.
Charles Bland, Jr., Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the federal courts have the authority to penalize state court litigants for following state habeas corpus procedures?

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No. _____

In the
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Director, California Department of Corrections,
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v.

Charles Bland, Jr., ***Respondent.***

OPINION BELOW

The published opinion of the Court of Appeals for the Ninth Circuit is reported as *Bland v. California Dept. of Corrections*, 20 F.3d 1469 (9th Cir. 1994). A copy of the opinion is reproduced in Appendix A of this Petition.

JURISDICTION

The opinion below was filed on April 6, 1994. The Ninth Circuit denied California's petition for rehearing and suggestion for rehearing en banc on June 3, 1994. The Ninth Circuit has stayed issuance of the mandate until August 25, 1994.

Respondent Bland first invoked federal court jurisdiction in this habeas corpus case under 28 U.S.C. § 2254. Petitioner, the California Department of Corrections, now invokes jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 2254(a) of Title 28 of the United States Code provides, in pertinent part:

> "The Supreme court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

California Rules of Court, rule 60 provides, in pertinent part:

> "When a petition for a writ of habeas corpus is filed in a reviewing court, seeking the release from or modification of conditions of custody of one who is confined under the process of any court of this state, the court

may, before passing on the petition . . . (2) request an informal response from the respondent or real party in interest. . . .

STATEMENT OF THE CASE

In 1987, Bland was convicted of one count of attempted murder and one count of assault with a firearm. The special allegation that Bland used a revolver during both crimes was found true, as was an allegation of infliction of great bodily injury during the commission of the attempted murder. Bland was sentenced to be imprisoned in state prison for life sentence, plus a consecutive seven years.

Bland appealed to the California Court of Appeal alleging, among other things, that the trial court erred when it refused to permit him to discharge his retained counsel.[1/] In addition to his appeal, Bland filed a state petition for writ of habeas corpus also alleging that the trial court erred by denying his request to discharge counsel, and that he was denied effective assistance of counsel. In renewing the discharge of counsel claim in the state habeas corpus petition, Bland supplemented his argument with allegations outside the record on appeal. Appended to the habeas corpus petition were declarations, including those of Bland and his father. Bland specifically requested in the habeas corpus petition that the Court of Appeal issue an order to show cause and order an evidentiary hearing.[2/] The California Court of Appeal did neither. Instead the

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1. The pertinent portion of the Reporter's Transcript where Bland's counsel allegedly requested his substitution is reproduced in Appendix B of this Petition.

2. The pertinent portions of Bland's Opening Brief and Petition for Writ of Habeas Corpus, including the questioned declarations, are reproduced in Appendix C of this Petition.

California Court of Appeal, without issuing an order to show cause, asked the state to respond informally to the petition.[3] The Court also ordered that the petition be considered concurrently with the appeal. Relevant state law requires only that the State respond to the legal issues in such an informal response. The State is not required to admit or deny the factual allegations absent the issuance of an order to show cause.

The State opposed the contention that Bland was denied the right to dismiss his retained counsel via the direct appeal. The State did not address the discharge-of-counsel claim in its informal response. The State responded informally to the ineffective assistance of counsel claim raised in the habeas corpus petition.

The California Court of Appeal affirmed the judgment on appeal finding that Bland had not made an unequivocal, timely request to discharge his counsel.[4] In its opinion, the Court of Appeal addressed the issue of the denial of the request to discharge counsel only in the context the of the direct appeal. The California Court of Appeal, pursuant to California law, was thus confined to determining the substitution of counsel issue relying only upon the appellate record.

The habeas corpus petition was also denied. It resolved, adversely to Bland, only his claim of ineffective

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3. The order of the California Court of Appeal, requesting the State to file an opposition to the petition is attached as Appendix D of this Petition.

4. The pertinent portion of the opinion filed by the California Court of Appeal is reproduced in Appendix E of this Petition.

assistance of counsel. The opinion did not address the substitution of counsel issue in the context of the habeas, where, under California law, the state appellate court could have considered the declarations as a factual predicate to that claim. In the context of the California Court of Appeal opinion, the habeas petition was labeled "consolidated" with the direct appeal. Under state law, that did not mean that the declarations could be considered in determining the substitution of counsel claim, a direct appeal issue. In addition, nothing in the state court's opinion shows that the court ever considered any of the supplemental allegations or declarations in deciding the discharge-of-counsel issue.

Bland then entered the federal district court. Magistrate Judge R. J. Groh, not relying upon the declarations of Bland and his father, recommended that the writ be denied.[5/] However, District Court Judge David V. Kenyon declined in part to adopt the Magistrate Judge's Report and Recommendation and granted Bland's habeas petition, finding that the state trial court denied Bland a Sixth Amendment right to counsel of his choice.[6/] When the writ was granted, as part of the "facts" supporting its decision, the district court, for the first time in any state or federal court proceeding, set forth as conclusively true statements taken from the declarations appended solely to

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5. The Report and Recommendation of Magistrate Judge R. J. Groh is reproduced in Appendix F of this Petition.

6. The order declining to adopt in part Magistrate Judge Groh's Report and Recommendation and granting the petition for writ of habeas corpus, authored by District Court Judge David V. Kenyon, is reproduced in Appendix G of this Petition.

the state habeas corpus petition.

The declarations placed Bland's claim in a substantially different posture. Indeed, relying upon the declarations, the district court found facts true that were not in the record. For example, the district court found that Bland's father had contacted trial counsel, Ronald Anderson, to ask why he had not contacted eyewitnesses to the shootings, and that in response, Anderson simply asked for more money. Further, the court found that Bland's father then asked Anderson for his son's file and said he was going to hire a new lawyer but soon thereafter determined he could not afford a new lawyer. The Court also found, without any support in the trial record, that Bland's father appeared in court and requested on his son's behalf that the judge take Anderson off the case. Finally, the District Court noted:

> "According to petitioner, Anderson spent only about 15 or 20 minutes with him before trial. In the limited time Anderson did spend with petitioner his focus (according to petitioner) was on convincing petitioner to plead guilty. Anderson first asked petitioner to take the stand during trial without preparing him or going over his testimony. Declaration of Charles Bland, Jr."

The State, of course, appealed to the Ninth Circuit on the procedural point. However, the Ninth Circuit Court of Appeals, in a published decision, determined that the statements in the declarations of petitioner and his father could be construed as conclusively true and entitled to a presumption of correctness in subsequent federal court proceedings.

Indeed, the Ninth Circuit, in deciding the discharge-of-counsel issue on the merits, also relied on certain statements from the declarations. More specifically, that:

> "Bland's declaration indicates that although there may not have been total lack of communication between Bland and Anderson, there was certainly very little communication in that Anderson spent only 15-20 minutes with Bland prior to trial. Nor did Anderson prepare Bland to take the witness stand. Bland's declaration states that Anderson did not pursue several eyewitnesses who had identified Gascon as the shooter. The record also reveals a lack of diligence on Anderson's part which most certainly led to his subsequent disbarrment."[7] *Bland*, 20 F.3d at 1477.

The State filed a petition for rehearing and suggestion for rehearing en banc, arguing, in pertinent part, that the Ninth Circuit improperly determined that declarations appended to a state habeas corpus petition may be construed as true in subsequent federal proceedings based upon a misunderstanding of the relevant facts and state law. Further, that even if the decision were compelled under the federal Constitution, for the separate and distinct reason that pursuant to *Teague v. Lane*, 488 U.S. 288, 299-300, 103 S.Ct 1060, 103 L.Ed.2d 334 (1988), the Court should not have construed statements in the

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7. The fact that Anderson was disbarred was set forth in the declaration of Bland, Sr. That fact was also confirmed independently by the United States District Court.

declarations as true for the first time because it improperly depended upon the retroactive application of a "new rule" of law imposing novel obligations upon the State. The State's requests for a rehearing or a rehearing en banc were denied.[8/]

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8. The Order denying appellant's petition for rehearing and suggestion for rehearing en banc is reproduced in Appendix H of this Petition.

REASONS WHY THE WRIT SHOULD ISSUE

The Ninth Circuit improperly interfered with state habeas corpus procedural law by determining that a state prisoner's unproved factual allegations in declarations appended only to state habeas corpus petitions may be deemed written findings of fact and presumed correct in subsequent federal habeas corpus proceedings simply because the allegations were recited in a state court opinion after the prosecution properly answered those allegations informally under state law, without technically admitting or denying them.

When the writ was granted in this case, as part of the "facts" supporting the decision, the district court judge, for the first time in any state or federal court proceedings, set forth as conclusively true statements taken from declarations attached to a state habeas corpus petition. Although the State appealed to the Ninth Circuit on the point, the Court of Appeals determined the statements in the declarations of petitioner and his father could be construed as wholly true in the subsequent federal court proceedings because the State waived any objection to the declarations by failing to deny them at the state court level. This rule applied, the panel held, even though at the state court level, the State was only called upon to respond informally to the petition and was thus not required by its own laws to deny the factual allegations in the declarations. *Bland*, 20 F.3d at 1474.

The Ninth Circuit also erroneously determined the statements in the declarations were factual findings from the California Court of Appeal which should be presumed correct, and that the State had waived any objection to the

allegations in the declarations by not disputing them in the district court. Each and every one of those rulings is either factually inaccurate or based upon a misapprehension of controlling precedent. The ruling also improperly interferes with state law, in that it frustrates the State's ability to define its own procedural rules and instead allows the federal court to redefine the consequences of those rules without any constitutional mandate.

First, the Ninth Circuit considered it "[m]ost important[]" that: "the State concede[d] that it responded to Bland's ineffective assistance of counsel claim in the court of appeal, the context within which these declarations were made. Although this response may have been informal, it provided an opportunity for the State to refute any factual allegations contained in the declarations with which it disagreed." *Bland*, 20 F.3d at 1474. To say there was an opportunity to dispute the allegations in the declarations, as the Ninth Circuit noted, is a far cry from a concession to the truthfulness of the allegations, when state law itself says the opposite. In fact, it demonstrates a misapprehension of relevant state law and creates a new, significantly different and unduly onerous rule for future habeas corpus litigation.

Under state law, the fact that the State did not avail itself of an informal opportunity to respond to the declarations does not mean the State conceded all facts not contradicted. Thus, by construing the declarations as true without the issuance of an order to show cause from the state court, the Ninth Circuit "sandbagged" the State which, in this time of scarce resources, responded in the state court only on the legal issues presented, as is expected under state law when an informal response is requested. Under state law, an informal response to a habeas corpus

petition generally precedes and assists the court's determination of whether to issue an order to show cause. *See* Cal. Rules of Court, rule 60; *see also*, Drafter's Notes. It is only when an order to show cause is issued and a return is filed which specifically admits or fails to dispute the allegations in the petition, that uncontradicted factual allegations of the petition can be deemed true in the state court. *In re Harris*, 5 Cal.4th 813, 823, fn. 2, 21 Cal.Rptr.2d 373, 376, 855 P.2d 391, 394 (1993); *In re Sixto*, 48 Cal.3d 1247, 1251-1252, 259 Cal.Rptr. 491, 492-493, 774 P.2 164, 165 (1989); *In re Lewallen*, 23 Cal.3d 274, 278, 152 Cal.Rptr. 528, 530, 590 P.2d 383, 385-386 (1979); *In re Love*, 11 Cal.3d 179, 182-184, 113 Cal.Rptr. 89, 91, 520 P.2d 713, 715 (1974).

In order to prevent this situation from occurring again, the State must now treat every request for an informal response of any type in the California Court of Appeal as if it were an order to show cause. Otherwise, we risk a replay of the outcome here. It is incongruous that, although the state system is set up to encourage informal responses without requiring factual investigations, the state, as litigant, will be pressured to undermine the state's own policy in state court because the federal courts will give the informal response the opposite effect, without any constitutional mandate requiring such an interpretation of state law. This interpretation of state law is tantamount to saying to the state courts that it must construe factual allegations as true in its own collateral proceedings, regardless of contrary state policy, because if the litigant does not specifically deny the allegations there, the result is going to be the same. The decision places an undue burden on state judicial proceedings, and it is a burden

which the state has repudiated. *See, In re Clark*, 5 Cal.4th 750, 769, fn.9, 21 Cal.Rptr.2d 509, 528, 855 P.2d 729, 741 (1993). This blatant attempt by the panel to "federalize" state procedural law should not be allowed to stand.

The panel also incorrectly concluded the statements in the declarations could be construed as accurate, because they were factual findings of the California Court of Appeal, which should be presumed correct pursuant to 28 U.S.C. § 2254, subdivision (d). *Bland*, 20 F.3d at 1474. This is simply wrong. In the California Court of Appeal decision, *it did not find that the facts in the declarations were true*. Instead, the California Court of Appeal merely noted that petitioner appended certain declarations to the petition and recited the allegations set forth in them. The California Court of Appeal did not consider the discharge-of-counsel issue in the context of the state habeas corpus petition, and, in the context of the direct appeal the court made no reference whatsoever to either the supplemental allegations or the declarations concerning the discharge-of-counsel issue.

Consistent with applicable state law, the California Court of Appeal *assumed* the facts stated in the declarations to be true solely for the purpose of disposing of the writ for its failure to make out a case demonstrating error. Indeed, under applicable state law, when a habeas corpus petition has been filed, the state court assumes the facts set forth by the petitioner to be true, to determine if a prima face case for relief has been established. *In re Lawler*, 23 Cal.3d 190, 194, 151 Cal.Rptr.2d 833, 835, 588 P.2d 1257, 1259 (1979), citing *In re Hochberg*, 2 Cal.3d 870, 875, fn.4, 87 Cal.Rptr. at 681, 471 P.2d 1 (1970); see also *In re Clark*, 5 Cal.4th at 769 fn.9, 21 Cal.Rptr.3d at 521,

855 P.2d at 741. Indeed, even the Ninth Circuit has specifically determined under its supervisory power over the federal district courts that where a court only assumes facts to be true, it does not make a factual finding. *United States v. Freitas*, 800 F.2d 1451, 1454-1455 (9th Cir. 1986). Accordingly, the Ninth Circuit was incorrect in stating that the California Court of Appeal had made written factual findings regarding the allegations contained in the declarations which should be presumed correct. *Bland*, 20 F.3d at 1474.

The Ninth Circuit's ruling that the State waived its right to object to the declarations in the United States District Court is also inaccurate. The Court asserted, "the State did not dispute those factual allegations in the district court. Nor did it request an evidentiary hearing to resolve any disputes. To the extent the State had a dispute with the facts as stated in the decision of the [California] Court of Appeal, it should have raised it in the district court." *Bland*, 20 F.2d at 1474.

The problem with this waiver holding is that it is factually incorrect. The State has absolutely no "dispute with the facts as stated in the decision of the [California] Court of Appeal." The State has a dispute with the Ninth Circuit's interpretation of the state court of appeal opinion. As pointed out above, the state court addressed the discharge-of-counsel claim only in the context of the direct appeal based on the four corners of the appellate record. At no time did the state court supplement its analysis of the discharge-of-counsel issue with any "facts" alleged in the habeas corpus petition or in the declarations appended to the state habeas corpus petition. In fact, the California Court of Appeal never even addressed the discharge-of-

counsel issue raised in the habeas corpus petition. If anyone would have had "a dispute with the facts as stated in the decision of the [California] Court of Appeal," it should have been defendant Bland, not the State, because only Bland would have reason to complain about the failure of the Court of Appeal to address his discharge-of-counsel claim in light of his supplemental allegations and declarations.

This ruling also flies in the face of the record and contravenes standard practice in the Central District of California. The State did nothing to concede the allegations made by Bland. At the district court level, the magistrate judge issued an order to show cause requesting a return by the State. The State complied and filed a return which specifically alleged, "petitioner has not been deprived of any constitutional rights and is not entitled to a discharge from his present confinement." In the context of the return, the State relied only on the facts from the state court transcript of the proceedings where the request for substitution of counsel was made and that portion of the California Court of Appeal decision resolving the issue on direct appeal. These facts were significantly different than those set forth by Bland in relation to the claim, thus putting the facts in dispute.

The panel's decision finding that the State waived any objection to the allegations in the declarations by failing to raise it in the district court implicitly places an entirely new burden on respondent, not required by the habeas rules. That is, when responding to petitions in the district court, the State must now specifically deny every factual allegation with which it disagrees or risk having it deemed admitted. However, Rule 5 of the Rules

Governing Habeas Corpus Cases specifies what must be included in the response to a petition. It states only that the answer must "respond to the allegations of the petition." Rule 5, Rules Governing Habeas Corpus Cases, 28 U.S.C. § 2254. Of significance is that the rule does not state that each and every factual allegation set forth in the petition with which respondent disagrees must be specifically denied, lest it be construed against respondent. Nor has common practice within the Central District ever required as much. Notably, the magistrate judge who first ruled on the petition found that the writ should be denied, and in so ruling, *did not rely on the contested facts later relied upon by the district court*. Thus, while the State in this case did nothing to concede the factual allegations in the district court, a waiver was inappropriately found by the panel nonetheless.

In determining the State waived any objection to these new factual findings, the panel also stated the State should have requested an evidentiary hearing to resolve any dispute with petitioner's version of the facts. *Bland*, 20 F.3d at 1474. Again, no rule governing habeas litigation prior to this point imposed a duty upon a respondent to request an evidentiary hearing or risk a waiver of a disputed factual issue. Indeed, the State's response to the writ was merely a legal response, stating why the writ should be denied without an evidentiary hearing. It would be inconsistent with Central District practice before magistrates to construe this as a concession to the facts. Accordingly, finding waiver by the State on this basis was also premised upon a misinterpretation of relevant law.

Finally, even if the decision were appropriate, a separate and distinct reason also warrants the request for

certiorari. That is, the decision contravenes this Court's recognized authority beginning with *Teague v. Lane*, 488 U.S. 288, 299-300, 103 S.Ct. 1060, 1070, 103 L.Ed.2d 334 (1988), that a "new rule" of constitutional law, or even a settled rule applied in a novel setting, cannot work retroactively in federal habeas corpus proceedings to invalidate a final state criminal conviction. *Stringer v. Black*, 503 U.S. __, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); *Butler v. McKellar*, 494 U.S. 407, 110 S.Ct 1212, 108 L.Ed.2d 347 (1990). While the *Bland* decision was not based upon a requirement of the federal constitution, the reasoning underlying the decision in *Teague* is equally applicable to this case. Indeed, at the time this case was pending both on habeas in the California Court of Appeal and before the United States District Court, no rule dictated that when a state appellate court denies a habeas petition for lack of a prima facie case, and in so doing, recites allegations in declarations appended to the habeas petition, that recitation may be construed as conclusively true and entitled to a presumption of correctness. Thus, the court should not have construed statements in the declarations as true for the first time in federal habeas corpus proceedings because it improperly depended upon the retroactive application of a "new rule" of law imposing novel obligations upon the State.

If this ruling is allowed to stand, it will improperly interfere with state law in that it frustrates the State's ability to define its own procedural rules and instead allows the federal court to redefine the consequences of those rules, without a constitutional mandate. Moreover, the ruling will impose an entirely new and onerous burden on

the State in all future habeas proceedings.[9/]

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9. That this ruling will have widespread effect on the State of California is evidenced by the number of habeas corpus proceedings filed each year. During the 1991-1992 fiscal year 3, 282 petitions for writs of habeas corpus in criminal matters were filed in superior court, 2,955 original proceedings in criminal matters were filed in the courts of appeal; and 970 original habeas corpus petitions were filed in the California Supreme Court. (II Judicial Council of Cal. 1993 Annual Report, Judicial Statistics for Fiscal Year 1991-1992.)

CONCLUSION

For these reasons, petitioner requests a writ of certiorari issue to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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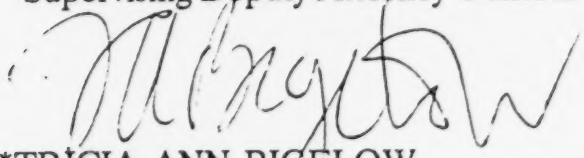

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES BLAND, JR.,
Petitioner-Appellee,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellants.

No. 93-55766
D.C. No. CV-91-04991-Kn
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted
March 9, 1994—Pasadena, California

Filed April 6, 1994

Before: Myron H. Bright,* Charles Wiggins, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

*Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/Right to Counsel/ Habeas Corpus

The court of appeals affirmed a district court grant of a habeas petition. The court held that a state trial court erred when, after a defendant's counsel made statements indicating that the defendant wanted another attorney, it failed to inquire as to the defendant's reasons for requesting substitute counsel.

Appellee Charles Bland Jr. was charged with attempted murder and firearms offenses in state court. Bland's retained counsel failed to appear on the morning of trial. After counsel again failed to appear, counsel was found in contempt of court. When he later appeared in court, counsel stated that it was his understanding that Bland wanted another attorney to represent him. Counsel further stated "I guess I have a motion to be relieved as counsel," and that Bland wanted a public defender to represent him. The court did not relieve the counsel, and instead set a trial date. Bland was convicted.

Bland appealed to the California Court of Appeal, where he claimed that the trial court erred in denying his motion to discharge retained counsel. In his consolidated petition for habeas, Bland argued that he was denied effective assistance of counsel. Bland presented declarations from himself and his father regarding his retained counsel's performance. The declarations indicated that counsel did not spend much time with Bland, and did not pursue eyewitnesses. The court of appeal affirmed the convictions. The California Supreme Court denied Bland's petition for review.

Bland filed a habeas petition in the district court. Bland again presented the declarations regarding his counsel's performance. The court granted the petition, concluding that Bland was denied his right to discharge counsel in violation

of the Sixth Amendment. The court found that Bland had made a motion to substitute counsel.

Appellants California Department of Corrections and the Attorney General of the State of California (collectively, the State) appealed, contending, among other things, that: 1) Bland failed to exhaust state remedies; 2) the district court erred in holding that the state trial court denied Bland the right to discharge counsel; and 3) any alleged error was harmless.

[1] Bland satisfied the exhaustion requirement. Not only did he present the operative facts in both the California Court of Appeal and the Supreme Court, but he presented the substance of his federal habeas claim to those courts. In both California courts, Bland argued that the state trial court improperly denied his motion to discharge counsel.

[2] The record supported the district court's conclusion that Bland requested substitute counsel. The statements of Bland's attorney indicated that he wanted another attorney to represent him, and that he was making a motion to be relieved of counsel. The trial court's response suggested that it was aware of Bland's request.

[3] Bland's request for substitute counsel was timely; [4] the motion came before trial began, and Anderson was not much more prepared than a substitute counsel would have been.

[5] The trial court in this case summarily denied Bland's request without making the requisite inquiry as to why he sought substitute counsel. [6] Because there was no inquiry, the nature and extent of the conflict between counsel and Bland could not be determined. [7] Thus, the trial court erred in failing to inquire as to Bland's reasons for requesting substitute counsel.

[8] The district court did not err in holding that Bland need not establish prejudice in order to obtain habeas relief for a violation of his Sixth Amendment right to counsel of his choice. [9] Moreover, Bland established prejudice as a result of Anderson's representation.

COUNSEL

David Glassman, Tricia Ann Bigelow, Deputy Attorneys General, Los Angeles, California, for the respondents-appellants.

William S. Harris, Stewart & Harris, Pasadena, California, for the petitioner-appellee.

OPINION

T.G. NELSON, Circuit Judge:

I

OVERVIEW

The Director of the California Department of Corrections and the Attorney General of the State of California (collectively referred to as the "State") appeal the district court's grant of Charles Bland's (Bland) habeas petition.[1] The district court concluded that the state trial court denied Bland his Sixth Amendment right to obtain counsel of his choice. We affirm.

[1]Charles Bland, Jr. is referred to as "Bland"; Charles Bland, Sr. is referred to as "Mr. Bland."

II

FACTS AND PROCEDURAL HISTORY

On February 4, 1987, three men in a blue and white Suzuki Jeep drove past a group of people standing at a bus stop in Inglewood, California. The men in the jeep were members of the street gang, the Cripps. Some of the people at the bus stop were members of the rival gang, the Bloods. One of the men in the jeep fired several shots into the group, wounding a bystander. A number of the eyewitnesses identified the driver as Dazarri Waller and the shooter as Shawn Gascon (also spelled Gaskin). The third occupant was subsequently identified as Darren Wannamaker.

Inglewood Police Detectives, Russell Enyeart and Stephen Young, were dispatched to the scene where they met Officer Rick Clark who had obtained statements from the witnesses. Based upon these statements, warrants were issued for the arrests of Waller and Gascon. Gascon waived his right to remain silent and told the officers that he had not been in the jeep. He stated that he had received a phone call from Wannamaker who had told him that Wannamaker and Bland were riding in Waller's jeep when several members of the Bloods threw bottles at them. After driving to Bland's house where Bland retrieved a gun, they drove back to find the gang members who had taunted them. Bland, the rear passenger, then fired four shots into the group, one of which wounded an innocent bystander who was waiting for the bus. Waller confirmed that Bland had fired the shots. During interrogation, Bland admitted having obtained the gun from his house and admitted that he was in the jeep; however, he denied firing the shots. When he took the stand at trial, he denied making those admissions.

The jury convicted Bland of attempted murder, personal use of a firearm, and the intentional infliction of great bodily injury with regard to the wounded bystander. Bland was also

convicted of assault with a firearm and personal use of a firearm with respect to the intended victim. He was ultimately sentenced to life imprisonment plus seven years. Bland appealed to the California Court of Appeal (Second Appellate District, Division One) where he claimed that the trial court erred in denying his motion to discharge retained counsel. In his consolidated petition for habeas, he argued that he was denied effective assistance of counsel.[2] The Court of Appeal affirmed the convictions with a modification to the sentence. The California Supreme Court denied Bland's petition for review.

On September 17, 1991, Bland filed a habeas petition in the United States District Court for the Central District of California. The magistrate judge held an evidentiary hearing on one of Bland's claims, counsel's failure to seek suppression of inculpatory statements made by Bland following his arrest. On September 25, 1992, the magistrate judge filed his report recommending dismissal of the habeas petition. The district court declined to adopt that recommendation and granted the habeas petition on April 21, 1993, concluding that Bland was denied his right to discharge counsel in violation of the Sixth Amendment. The State appeals, contending that: (1) Bland failed to exhaust state remedies; (2) the district court erred in construing factual allegations contained in the declarations of Bland and his father as true; (3) the district court erred in holding that the state trial court denied Bland the right to discharge counsel; and (4) any alleged error was harmless. We affirm.

III

DISCUSSION

We review *de novo* the district court's decision to grant a

[2]He also raised several other issues not relevant to this appeal.

habeas petition. *Thompson v. Brewer*, 923 F.2d 1361, 1364 (9th Cir. 1991).

A. *Exhaustion*

The State argues that Bland failed to exhaust his state remedies because the district court considered factually different claims than the California state courts considered.[3] We disagree. A state prisoner must exhaust his state remedies before petitioning for a writ of habeas corpus in federal court. *McQueary v. Blodgett*, 924 F.2d 829, 833 (9th Cir. 1991). The federal habeas petitioner must "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Id.* (internal citations omitted). In order to satisfy the exhaustion requirement, the petitioner must have fairly presented the substance of his federal claim to the state courts. *Id.*; *see also Hudson v. Rushen*, 686 F.2d 826, 830 (9th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983). A federal claim "is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based." *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986).

[1] After reviewing the record, we are convinced that Bland has satisfied the exhaustion requirement. Not only did he present the operative facts in both the California Court of Appeal and the Supreme Court, but he presented the sub-

[3]Bland contends that the State waived its right to raise the exhaustion claim on appeal because it failed to present that issue in the district court. When a state fails to raise the nonexhaustion defense in the district court, we may properly conclude that it waives that defense. *See Granberry v. Greer*, 481 U.S. 129 (1987); *see also Brown v. Maass*, 11 F.3d 914 (9th Cir. 1993). Because we conclude that Bland has exhausted his state remedies, we need not determine whether the State waived the nonexhaustion defense.

stance of his federal habeas claim to those courts. In both California courts, Bland argued that the state trial court had improperly denied his motion to discharge counsel in violation of his Sixth and Fourteenth Amendment rights. His Sixth Amendment right to counsel is at issue here. Because Bland presented the identical federal claim to the California appellate courts, he has fulfilled the exhaustion requirement.

The State contends that Bland failed to exhaust his claim because the district court relied upon facts not considered by the state courts. In particular, the State bases its argument upon several factual allegations contained in two declarations which the district court assumed to be true, the declaration of Bland's father, Charles Bland, Sr. (Mr. Bland), and the declaration of Bland himself. Those declarations reveal the following facts. Mr. Bland contacted Bland's attorney, Ronald Anderson, in June, 1987, to determine why Anderson had not contacted eyewitnesses who identified Gascon as the shooter. Because Mr. Bland was not satisfied with the way Anderson was handling the case, he told Anderson he was going to find another attorney. Mr. Bland did not retain another attorney and attempted to reach Anderson without success until the July 20, 1987, trial date. On that date, Mr. Bland asked the judge, on his son's behalf, to remove Anderson from the case, but the judge declined to do so. According to Bland's declaration, Anderson spent only 15-20 minutes with him prior to trial. Bland also claimed that Anderson pressured him to plead guilty. When Bland asked Anderson why he had not contacted several eyewitnesses (named in the police reports) who had identified Gascon as the shooter, Anderson responded: "What are you, a jailhouse lawyer?" Bland also stated that Anderson did not spend any time preparing him to take the witness stand. Finally, Bland's declaration states that he did not feel Anderson was concerned with his case and as a result, he spoke to Anderson, his parents and the judge about obtaining a new lawyer.

The State contends that Bland's denial of his right to discharge claim is unexhausted because the factual allegations

contained in the two declarations and relied upon by the district court present a substantially different factual context than was presented in the state courts. This claim lacks merit. These same declarations were presented to the Court of Appeal as part of Bland's ineffective assistance of counsel claim raised in his consolidated habeas petition. In rejecting Bland's ineffective assistance of counsel claim, the Court of Appeal noted that this contention was "related" to his substitution of counsel claim. In addition, the Court of Appeal reviewed and considered both declarations before concluding that these facts failed to demonstrate inadequate assistance of counsel. When Bland appealed this decision to the California Supreme Court, he presented the same facts and referenced the same declarations. These were the same declarations relied upon by the district court.

Bland presented the operative facts and legal theories to both state appellate courts. Therefore, because the substance of his federal claim was fairly presented to and rejected by the California appellate courts, we conclude that Bland has satisfied the exhaustion requirement. *See Anderson*, 459 U.S. at 6; *see also Hudson*, 686 F.2d at 830 (claim exhausted under state law "when the California Court of Appeal decided it adversely to [defendant] and the California Supreme Court denied a hearing"). "On the record before it, the state court had a fair opportunity to consider the claim and to correct the asserted constitutional defect in the petitioner's conviction." *Hudson*, 686 F.2d at 830.

B. *Truth of Declarations*

The State next argues that the district court erred in assuming the truth of the allegations contained in the declarations,[4] because the State never had the opportunity to refute those factual allegations. In a habeas proceeding, the State responds

[4]The district court stated that it assumed the truth of these declarations to the extent they were not inconsistent with the record.

by return to a habeas petition only after the court issues an order to show cause. *See In Re Sixto*, 774 P.2d 164, 165 (Cal. 1989). The State's return must allege facts tending to establish the legality of the petitioner's detention. The petitioner then responds by filing a traverse. *Id.* When the State's return fails to dispute the factual allegations contained in the petition and traverse, it essentially admits those allegations. *Id.* at 165-66. Accordingly, the State argues, the allegations contained in the declarations cannot be deemed admitted because the California Court of Appeal did not issue an order to show cause.

The California Court of Appeal considered both declarations when it addressed Bland's ineffective assistance of counsel claim in the consolidated habeas proceeding, but nonetheless denied relief. Even though these facts are contained in the decision of the Court of Appeal and were drawn directly from the declarations, the State did not dispute those factual allegations in the district court. Nor did it request an evidentiary hearing to resolve any disputes. To the extent the State had a dispute with the facts as stated in the decision of Court of Appeal, it should have raised it in the district court. Accordingly, we find that the State waived this issue. *See Harris v. Pulley*, 885 F.2d 1354, 1367 (9th Cir. 1988) (state waived abuse of writ argument because failed to raise it in district court), *cert. denied*, 493 U.S. 1051 (1990).

Although not explicitly stated, apparently the State is also arguing that these written findings in the Court of Appeal decision should not be presumed correct, *see* 28 U.S.C. § 2254(d),[5] either because the factual dispute was not resolved in the state court, or the material facts were not adequately developed. *See id.* § 2254(d)(1)-(3). Other than stating that these declarations are self-serving, the State does not argue that these facts are indeed erroneous. Nor does it assert why

[5]A State appellate court's factual findings are also presumed correct unless they are not fairly supported in the record. *See Parker v. Dugger*, 498 U.S. 308, 320 (1991).

they are incorrect. Rather, it contends only that it did not have an opportunity to dispute them. Absent convincing evidence to the contrary, we defer to state court factual findings and we may set them aside only if they lack even fair support in the record. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *see also* § 2254(d).

Most importantly, the State concedes that it responded to Bland's ineffective assistance of counsel claim in the Court of Appeal, the context within which these declarations were made. Although this response may have been informal, it provided an opportunity for the State to refute any factual allegations contained in the declarations with which it disagreed.

C. *Right to Discharge Counsel*

1. Factual Background

Mr. Bland hired Ronald Anderson to represent Bland and the case was set for trial on July 20, 1987. Anderson failed to appear on the morning of trial. That afternoon Anderson appeared and informed the court that he had not appeared earlier because Mr. Bland had advised him that he was retaining another attorney for his son. Mr. Bland then picked up the file. Anderson stated to the court that he was under the impression that someone else was to represent Bland until that morning when he was informed that Bland had not retained other counsel. Based upon his representation, the trial court continued the trial until August 10, 1987.

Anderson again failed to appear on August 10. When the court asked Bland whether he could explain Anderson's absence, Bland responded: "No. I believe he is under the impression he is no longer on the case." The court asked Bland how Anderson had gotten that impression because the court had not relieved him as counsel. Bland responded that he did not know. Accordingly, the court found Anderson to be in contempt of court and issued a bench warrant. Anderson

appeared in court on August 14, 1987, and told the court that he had made a mistake in calendaring the trial date. The following exchange then took place:

> THE COURT: Are you ready for trial?
> ANDERSON: No, Your Honor. First of all, I am trailing on another matter for trial here on Tuesday.
> THE COURT: What is your pleasure on this matter
> ANDERSON: *It is my understanding that [Bland] is wishing that another attorney represent him.*
>
> *I guess I have a motion to be relieved as counsel, and he wants a public defender to represent him.*
> THE COURT: *He may wish that, but that is not going to happen.*

The trial date was then set for September 12, 1987, but was continued twice to permit Anderson time to prepare for trial and four additional times on prosecution motions. Trial finally commenced on October 29, 1987. Sentencing was to occur on December 1, 1987, but Anderson failed to appear. After finding that Bland was indigent, the trial court appointed a public defender to represent him. The public defender declared a conflict and a panel attorney was substituted for the public defender. After several continuances, sentencing finally occurred on February 25, 1988.

Mr. Bland complained to the California State Bar about Anderson's conduct. The district court noted that Anderson was disbarred as a result of default in that he failed to answer the charges against him. His failure to appear at Bland's sentencing was one of the several unanswered charges against him.

2. Merits

The State argues that the district court erred both in finding that Bland made a motion to substitute counsel and in con-

cluding that the trial court denied Bland the right to discharge his attorney. We reject both contentions.

We review the trial court's refusal to substitute counsel for an abuse of discretion. *United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990). The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel, *see id.* at 485, and thus is properly considered in this habeas proceeding.

[2] The record supports the district court's conclusion that Bland requested substitute counsel. First, the statements of Bland's attorney indicate that Bland wanted another attorney to represent him, a public defender, and that he was making a motion to be relieved of counsel. Second, the trial court's response suggests that it was aware of Bland's request because his request was summarily denied: "[Bland] may wish that, but that is not going to happen." To be sure, the request is not a model of specificity; but, given the circumstances of the case, it was a request which, at the very least, required further inquiry by the court.

Having concluded that Bland's motion was denied, we next determine whether the district court erred in ruling that the state trial court's denial was an abuse of discretion. When reviewing the denial of a motion to substitute counsel for abuse of discretion, we consider the following three factors: "(1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense." *Walker*, 915 F.2d at 482 (internal quotations omitted). These elements required under the Sixth Amendment are consistent with California state law which protects the defendant's constitutional right to counsel of his choice. *See, e.g., People v. Ortiz*, 800 P.2d 547, 552-53 (Cal. 1990); *People v. Marsden*, 465 P.2d 44, 47-49 (Cal. 1970).

(i) Timeliness

[3] The State argues that even assuming a request for substitute counsel was made, it was untimely, and thus was properly denied. However, given the posture of this case when the request was made, the request was timely. It is within the trial court's discretion to deny a motion to substitute made on the eve of trial where substitution would require a continuance. *Walker*, 915 F.2d at 482. In this case, the motion was made on August 14, 1987, after the July 20 trial date had been continued. The motion also preceded the trial court's immediate grant of another continuance. In any event, the trial did not actually occur until October 29, 1987, after several additional continuances.

[4] Furthermore, we do not face the situation we faced in *Hudson* in which the motion for substitute counsel came at the close of the prosecution's case and would have caused either significant delay or a mistrial. 686 F.2d at 831. The motion came before trial began and Anderson was not much more prepared than a substitute counsel would have been because, at the time the motion for substitute counsel was made, Anderson had not yet prepared for trial. After the motion was denied, Anderson stated that he had not had an opportunity to prepare because he had just received the file the week before. In addition, the trial court did not indicate that it was denying the motion based upon timeliness grounds. *See Walker*, 915 F.2d at 482 (timeliness not dispositive of substitution issue when court did not indicate whether timing or delay affected its decision to deny the motion). Consequently, the timeliness factor is not dispositive and weighs in favor of Bland.

Finally, the State apparently also argues that the finding by the Court of Appeal that the motion was untimely should be presumed correct, *see Parker v. Dugger*, 498 U.S. 308, 320 (1991). However, because the timeliness finding is not fairly supported in the record, it is not presumed correct. *See id.*

(ii) Inquiry

The State concedes that once a request for substitute counsel has occurred, inquiry is required. *See United States v. Robinson*, 913 F.2d 712, 716 (9th Cir. 1990) (when defendant requests substitute counsel, court should make formal inquiry into the defendant's reasons for dissatisfaction with present counsel), *cert. denied*, 498 U.S. 1104 (1991). In *Walker*, we found the district court's limited inquiry into the defendant's complaints inadequate. 915 F.2d at 483 (inquired only as to counsel's legal competency when inquiry should have focused upon nature and extent of conflict between counsel and defendant).

Similarly, in *United States v. Torres-Rodriguez*, 930 F.2d 1375 (9th Cir. 1991), we reversed a conviction because the district court abused its discretion in denying the defendant's motion to substitute without inquiring as to his reasons for such a motion. *Id.* at 1381; *cf. Hudson*, 686 F.2d at 831 (denial of motion to substitute was proper because: (1) the motion was made at close of prosecution's case and (2) trial court rejected the motion after inviting defendant to make a statement regarding his complaint with counsel and after listening to his reasons for desiring new counsel). "We have no way of knowing the nature of [the defendant's] complaint with his appointed counsel, because the trial judge foreclosed all explanations of any kind regarding the motion to substitute." *Torres-Rodriguez*, 930 F.2d at 1381.

[5] Like *Walker* and *Torres-Rodriguez*, the trial court in this case summarily denied Bland's request without making the requisite inquiry as to why he sought substitute counsel. Unlike *Hudson*, where the court heard the defendant's complaints, 686 F.2d at 831, the trial court in the present case did not give Bland the opportunity to air his complaints.

(iii) Conflict

[6] Because there was no inquiry, we cannot determine the nature and extent of the conflict. There is no way of knowing

whether the dispute rose to the level of an irreconcilable conflict resulting in a total lack of communication and depriving Bland of effective assistance of counsel. *See Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970) (defendant denied effective assistance of counsel because he was embroiled in irreconcilable conflict with counsel). In *Brown*, the state court had summarily denied the defendant's several motions to substitute counsel, making no inquiry as to the reasons for his dissatisfaction with his attorney. *Id.* at 1169. In granting habeas relief, we made it clear that the problem was not in giving the indigent defendant his particular choice of counsel; rather, the problem was the court's failure to make an adequate inquiry to determine whether there was an irreconcilable conflict. *Id.* at 1170.

Similarly, the trial court in this case did not make the requisite inquiry. Our review is "hampered because the trial court made absolutely no inquiry into the defendant's request for substitution." *Torres-Rodriques*, 930 F.2d at 1381. Bland's declaration indicates that although there may not have been total lack of communication between Bland and Anderson, there was certainly very little communication in that Anderson spent only 15-20 minutes with Bland prior to trial. Nor did Anderson prepare Bland to take the witness stand. Bland's declaration states that Anderson did not pursue several eyewitnesses who had identified Gascon as the shooter. The record also reveals a lack of diligence on Anderson's part which most certainly led to his subsequent disbarrment.[6]

The State's argument that Bland should have made his dissatisfaction known to the court misses the point. The record indicates that Bland, through his attorney, did make the request. The trial court's obligation to inquire was triggered

[6]We note that although Bland need only show that some federal constitutional right was violated in order to warrant habeas relief, this result is consistent with California law. *See People v. Marsden*, 465 P.2d 44, 47-49 (Cal. 1970).

at that point. Indeed, the trial court may have ultimately concluded that granting Bland's request for new counsel was not required because no irreconcilable conflict existed. But, absent inquiry on the record, there is no way to determine whether it would have been proper to grant Bland's request. Further, contrary to the State's assertion, the fact that Anderson made the request, and not Bland, does not change the result. Anderson made the request on behalf of Bland: "It is my understanding that *the defendant* [Bland] is wishing that another attorney represent him.... He wants a public defender to represent him." (emphasis added).

[7] Finally, the State contends that Bland has failed to establish that he was indigent. Thus, the State argues, Bland was not entitled to the appointment of counsel as he requested. This argument lacks merit. Even if we assume Bland was not indigent, the Sixth Amendment nonetheless protects his qualified right to obtain retained counsel of his choice. *See United States v. Washington,* 797 F.2d 1461, 1465 (9th Cir. 1986) (under Sixth Amendment, criminal defendants who can afford to obtain counsel have a qualified right to obtain counsel of their choice). Whether Bland was indigent fails to resolve the issue with which we are presented.[7] Bland never had the opportunity to establish his indigency, or lack thereof, because the trial court did not inquire as to his reasons for requesting substitute counsel. Indeed, the failure to inquire is precisely the error we have identified.

D. *Applicability of Harmless Error Analysis*

Our conclusion that the state trial court erred in failing to

[7]We note that under California law, whether or not a defendant is indigent is irrelevant to the consideration of whether to permit discharge of retained counsel. "[A] court must *not* consider whether a defendant is indigent and will require appointment of counsel in ruling on his timely motion to discharge retained counsel." *Ortiz,* 800 P.2d at 555 (emphasis added).

inquire as to the nature of Bland's request for substitute counsel, does not end the inquiry. Rather, we must next determine (1) whether the *Brecht* harmless error standard applies, as the State argues, and if so, (2) whether the error was harmless. We hold that *Brecht*'s harmless error analysis does not apply when a defendant has been denied the right to substitute counsel.

In *Brecht v. Abrahamson*, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), the Supreme Court held that in reviewing habeas cases, an appellate court should determine whether the constitutional trial error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 373 (internal quotations omitted). This harmless error analysis applies only to trial errors and not to structural defects. *Id.* at 367. Because the latter defects infect the entire trial process, they defy harmless error analysis. Consequently, structural defects require automatic reversal. *Id.* The Court noted that deprivation of counsel is a structural defect requiring automatic reversal. *Id.*

"It is settled law that under the Sixth Amendment criminal defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice." *Washington*, 797 F.2d at 1465 (internal quotations omitted). "That right is not absolute, however, and must give way where its vindication would create a serious risk of undermining public confidence in the integrity of our legal system." *Id.* (internal quotations omitted).

Although Bland was not completely deprived of counsel, similar concerns are at issue when a defendant is denied the right to substitute counsel. At first blush, a prejudice requirement would seem to make sense. Whether or not a defendant has suffered prejudice would necessarily require a review of counsel's performance at trial, i.e., whether counsel's assistance was ineffective. Accordingly, relief would necessarily depend upon a defendant's ability to establish ineffective

assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).[8] Indeed, the State briefly engages in such analysis by arguing that Anderson's performance was adequate and competent.

However, we have held that "where there has been a complete disregard of the defendant's right to choose his own counsel, prejudice will be assumed." *Releford v. United States*, 288 F.2d 298, 302 (9th Cir. 1961) (granted defendant new trial because he was denied his Sixth Amendment right to choose counsel). Denial of the qualified right to counsel of choice is reversible error regardless of whether prejudice is shown. *United States v. Ray*, 731 F.2d 1361, 1365-66 (9th Cir. 1984) (no showing that defendant was denied counsel of his choice); *see also Ortiz*, 800 P.2d at 555 (reversal is automatic when defendant deprived of right to counsel of his choice). In the cases previously cited where we found that the trial courts erred in summarily denying the motions to substitute counsel without inquiring as to the reasons for those motions, the convictions were reversed. *See Torres-Rodriguez*, 930 F.2d at 1381; *Brown*, 424 F.2d at 1170 (habeas relief granted); *see also United States v. Williams*, 594 F.2d 1258, 1261 (9th Cir. 1979). There was no explicit discussion of a prejudice requirement in these cases; however, the issue was resolved by noting that the defendant was deprived of effective assistance of counsel. *See Williams*, 594 F.2d at 1260-61; *Brown*, 424 F.2d at 1170.

In confronting a somewhat similar situation, the Sixth Circuit declined to require a showing of prejudice. *See Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985). In *Wilson*, the Sixth Circuit granted a defendant's habeas petition after concluding both that the trial court erred in denying the defendant's

[8] *Strickland* requires the defendant to establish both that counsel's representation fell below an objective standard of reasonableness, 466 U.S. at 687-88, and that counsel's performance was prejudicial to the defense. *Id.* at 691-92.

request for substitute counsel and that no showing of prejudice was required. *Id.* at 286. It held that a prejudice requirement "has no applicability to counsel of choice cases since, unlike the right to counsel of choice, the right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* at 285 (internal quotation omitted).[9] The court reasoned that in requiring the defendant to establish prejudice as a result of the trial court's erroneous denial of his motion for substitution would focus attention upon the result obtained rather than upon the defendant's right to exercise his choice and "would lock the accused into his first selection of counsel unless he can prove conduct rising to the level of constitutional ineffectiveness." *Id.* at 286.

[8] In dicta, the Supreme Court has stated that to the extent that the right to counsel of one's choice is like the right to represent oneself, a defendant need not show prejudice to his defense in order to obtain reversal for a violation of that right because it "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Flanagan v. United States,* 465 U.S. 259, 267-68 (1984). Accordingly, we conclude that the district court did not err in holding that Bland need not establish prejudice in order to obtain habeas relief for a violation of his Sixth Amendment right to counsel of his choice.

[9] Even were we to assume that prejudice is required, we find that Bland has established the requisite prejudice as a result of Anderson's representation. The most damaging

[9]It should also be noted that in *Morris v. Slappy,* 461 U.S. 1 (1983), the Supreme Court reversed our decision and held that there is no Sixth Amendment right to a "meaningful relationship" between the accused and his counsel. *Id.* at 14. *Morris* is inapplicable to this case because the defendant in *Morris* sought several continuances in order to permit his attorney time to prepare for trial. When a trial court denies a continuance sought for purposes of preparation, an inquiry as to the prejudice suffered is appropriate. *See Wilson,* 761 F.2d at 285 n.17.

aspect of Anderson's representation was the presentation of inconsistent theories. For example, during the prosecution's case-in-chief, Anderson presented a theory that Bland had twice denied, i.e., that Gascon was the shooter. Bland had denied that Gascon was the shooter both in the taped telephone conversation between Gascon and Bland and during Bland's post-arrest statement. When Bland testified, he denied that he was present in the jeep (a fact he had previously admitted to the officers in his statement) and he also denied that Gascon was the shooter, the theory presented by Anderson during the case-in-chief.[10]

Inconsistencies between the theories presented by the defense and prosecution are a given. However, when those inconsistencies also arise from the defense's own camp, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. Accordingly,

[10]As the district court stated:

> the record strongly suggests that the reason the "Gascon" theory was pursued was that Anderson was so terribly unprepared before trial that he was unaware of the substance of one or all of the following: the taped phone conversation between petitioner and [Gascon], the February 18, 1987 post-arrest conversation between petitioner and Det. Young, and the version of events petitioner intended to convey when he took the stand in his own defense.
>
> . . . .
>
> Finally, the stark inconsistencies between the theory of the case pursued by Anderson during the government's case-in-chief (that Gascon did it), the theory suggested by the taped conversation and petitioner's statements to Det. Young (that petitioner *was* present but Gascon *was not* the shooter), and the theory put forth by petitioner once he took the stand (that petitioner *was not* present and Gascon *was not* the shooter), confirm petitioner's sworn declaration that he and his attorney had little if any substantive discussion prior to trial about whether petitioner would take the stand and, if so, what he would say.

because counsel's unprofessional errors undermine confidence in the outcome, we conclude that Bland has established prejudice. *See id.*

IV

CONCLUSION

Because Bland was denied the right to substitute counsel in violation of the Sixth Amendment, we affirm the district court's grant of his habeas petition.

AFFIRMED.

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APPENDIX B

TORRANCE, CALIFORNIA; MONDAY, JULY 20, 1987; P.M. SESSION DEPARTMENT SOUTHWEST "K" HON. CECIL J. MILLS, JUDGE

APPEARANCES:

THE DEFENDANT WITH HIS COUNSEL, RONALD ANDERSON, ESQ.; SUE LASICKA, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(MARGUERITE SENECHAL, OFFICIAL REPORTER.)

THE COURT: CHARLES BLAND.

ARE YOU CHARLES ANDREW BLAND?

THE DEFENDANT: YES.

THE COURT: THE RECORD WILL REFLECT YOUR APPEARANCE IN COURT WITH YOUR COUNSEL, MR. ANDERSON.

NOW, YOU WANTED TO MAKE A STATEMENT?

MR. ANDERSON: YES, YOUR HONOR.

I DID NOT APPEAR THIS MORNING. APPROXIMATELY FOUR WEEKS AGO I WAS ADVISED BY MR. BLAND, SR., THAT HE WAS RETAINING ANOTHER ATTORNEY. THEY GAVE ME A NAME. THEY CAME UP AND PICKED UP THE CONTENTS OF THE FILE.

I WAS UNDER THE UNDERSTANDING THAT SOMEONE WOULD APPEAR TODAY. I GOT A CALL THIS MORNING, I GUESS, ADVISING ME THEY DID NOT RETAIN COUNSEL.

THAT IS THE STATUS OF THE CASE

AT THIS TIME.

THE COURT: THE MATTER IS HERE FOR TRIAL. ARE YOU READY FOR TRIAL?

MR. ANDERSON: NO, YOUR HONOR.

I STOPPED WORKING ON THE TRIAL FOUR WEEKS AGO. I HAD JUST SUBBED IN APPROXIMATELY THREE WEEKS BEFORE.

I HAD JUST RECEIVED DISCOVERY MATERIAL, AND I TURNED THAT ALL OVER TO THE FATHER WHO ADVISED ME HE HAD RETAINED AN ATTORNEY.

ALSO, I AM TRAILING FOR TRIAL ON ANOTHER MATTER.

THE COURT: WHAT IS YOUR PLEASURE ON THIS MATTER, SIR?

MR. ANDERSON: WELL, AT THIS POINT IN TIME AS TO MY STATUS, OBVIOUSLY, SINCE THE COURT HAS ME DOWN --

THE COURT: YOU ARE THE ATTORNEY OF RECORD AT THIS TIME.

MR. ANDERSON: I UNDERSTAND THAT.

DEFINITELY, I WOULD NEED TO CONTINUE THE MATTER IN ORDER TO PREPARE FOR TRIAL.

THE COURT: UNTIL WHEN SIR?

MR. ANDERSON: WE ARE LOOKING AT AT LEAST THREE WEEKS, YOUR HONOR.

AUGUST 10?

THE COURT: IS THERE GOING TO BE A TIME WAIVER BY MR. BLAND?

MR. ANDERSON: YES

THE COURT: DO YOU GIVE UP YOUR SPEEDY TRIAL RIGHTS, AND AGREE THIS MATTER CAN GO TO 8/10/87, WITH THE

UNDERSTANDING THERE WOULD BE TEN DAYS FROM THAT DATE WITHIN WHICH TO START YOUR TRIAL?

THE DEFENDANT: YES.

THE COURT: DOES COUNSEL JOIN?

MR. ANDERSON: SO JOIN.

THE COURT: THAT IS THE ORDER. THANK YOU.

MR. ANDERSON: THANK YOU.

(AN ADJOURNMENT WAS TAKEN UNTIL MONDAY, AUGUST 10, 1987.)

TORRANCE, CALIFORNIA; MONDAY, AUGUST 10, 1987; P.M. SESSION DEPARTMENT SOUTHWEST "K" HON. CECIL J. MILLS, JUDGE

APPEARANCES:

THE DEFENDANT WITHOUT HIS COUNSEL, RONALD ANDERSON, ESQ.; MARK VEZZANI, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(MARGUERITE SENECHAL, OFFICIAL REPORTER.)

THE COURT: CHARLES BLAND.

HAVE YOU HEARD FROM THE LAWYER?

THE CLERK: MR. ANDERSON? I HAVE NOT.

THE COURT: BRING CHARLES BLAND OUT, PLEASE.

HAVE YOU BEEN IN TOUCH WITH YOUR LAWYER, MR. ANDERSON?

THE DEFENDANT: NO, SIR.

THE COURT: HAVE YOU SEEN HIM?

THE DEFENDANT: NO.

THE COURT: YOU DON'T KNOW WHY HE ISN'T HERE TODAY?

THE DEFENDANT: NO. I BELIEVE HE IS UNDER THE IMPRESSION HE IS NO LONGER ON THE CASE.

THE COURT: HOW DID HE GET THAT IMPRESSION? I DIDN'T BELIEVE HIM.

THE DEFENDANT: I DON'T KNOW.

THE COURT: I DON'T KNOW, EITHER.

IT APPEARS TO ME HE IS IN

CONTEMPT OF THIS COURT FOR FAILING TO APPEAR, AND I SO FIND.

I ISSUE A BODY ATTACHMENT FOR HIS ARREST.

BAIL ON THE BODY ATTACHMENT WILL BE $5,000.

YOUR MATTER WILL BE TRAILED FOR TRIAL TO FRIDAY, AUGUST 14TH, 1987.

THE CLERK IS DIRECTED TO NOTIFY HIS OFFICE AT THE NUMBER ON THE CARD IN THE FILE TODAY OF THAT ACTION THAT THE BODY ATTACHMENT WILL BE HELD UNTIL FRIDAY.

FURTHERMORE, THE CLERK IS DIRECTED TO SEND A COPY OF THE MINUTE ORDER TO THE ADDRESS ON THE CARD IN THE FILE IN THIS DAY'S MAIL TO INFORM HIM OF THE COURT'S ACTION.

YOU ARE REMANDED UNTIL BAIL IS POSTED IN THE AMOUNT HERETOFORE SET, AND I WILL SEE YOU BACK HERE ON FRIDAY.

THE DEFENDANT: OKAY.

(AN ADJOURNMENT WAS TAKEN UNTIL FRIDAY, AUGUST 14, 1987.)

TORRANCE, CALIFORNIA; FRIDAY, AUGUST 14, 1987; A.M. SESSION DEPARTMENT SOUTHWEST "K" HON. CECIL J. MILLS, JUDGE APPEARANCES:

THE DEFENDANT WITH HIS COUNSEL, RONALD ANDERSON, ESQ.; MICHAEL DUARTE, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(MARGUERITE SENECHAL, OFFICIAL REPORTER.)

THE COURT: CHARLES BLAND.

ARE YOU CHARLES BLAND?

THE DEFENDANT: YES.

THE COURT: THE RECORD WILL REFLECT YOUR APPEARANCE IN COURT WITH YOUR COUNSEL, MR. ANDERSON.

MR. ANDERSON: I WANT TO APOLOGIZE.

MONDAY I DID NOT APPEAR IN COURT ON THIS MATTER.

IT WAS DUE TO AN ERROR ON MY PART.

WHEN I WAS HERE PREVIOUSLY, I CONTINUED THE MATTER TO THE 10TH, ALTHOUGH MY NOTES READ, "TUESDAY, THE 11TH." MY OFFICE CALENDARED IT FOR THE 11TH INSTEAD OF THE 10TH. I WAS IN MY OFFICE ON THE 10TH.

I GUESS YOU ISSUED A BENCH WARRANT AND HELD IT TO TODAY.

THE COURT: I DID.

MR. ANDERSON: IT IS REALLY MY ERROR, JUDGE.

THE COURT: THE BENCH WARRANT IS

RECALLED AND QUASHED. THE BODY ATTACHMENT IS RECALLED AND QUASHED.

MR. ANDERSON: THANK YOU.

THE COURT: ARE YOU READY FOR TRIAL.

MR. ANDERSON: NO YOUR HONOR.

FIRST OF ALL, I AM TRAILING FOR TRIAL HERE ON TUESDAY.

THE COURT: WHAT IS YOUR PLEASURE ON THIS MATTER?

MR. ANDERSON: IT IS MY UNDERSTANDING THAT THE DEFENDANT IS WISHING THAT ANOTHER ATTORNEY REPRESENT HIM.

I GUESS I HAVE A MOTION TO BE RELIEVED AS COUNSEL, AND HE WANTS A PUBLIC DEFENDER TO REPRESENT HIM.

THE COURT: HE MAY WISH THAT, BUT THAT IS NOT GOING TO HAPPEN.

MR. ANDERSON: THIS IS A MATTER IN WHICH THE DEFENDANT HAD ADVISED ME THEY HAD ANOTHER ATTORNEY. THEY TOOK THE FILE AWAY FROM ME TO ANOTHER ATTORNEY. THEY DID NOT RETAIN THAT ATTORNEY, AND I JUST RECEIVED THE FILE ON SATURDAY.

I AM SURELY NOT READY TO GO.

THE COURT: WHEN DO YOU WANT IT TO GO OVER TO?

MR. ANDERSON: SEPTEMBER THE 12TH.

THE COURT: DO YOU GIVE UP YOUR SPEEDY TRIAL RIGHTS, AND AGREE THIS MATTER CAN GO TO 9/12/87, WITH THE UNDERSTANDING THERE WOULD BE TWENTY

DAYS FROM THAT DATE WITHIN WHICH TO START YOUR TRIAL?

THE DEFENDANT: YES.

THE COURT: DOES COUNSEL JOIN?

MR. ANDERSON: SO JOIN.

THE COURT: THAT IS THE ORDER.

MR. ANDERSON: THANK YOU.

THE COURT: YOU ARE WELCOME.

THE VIOLATION OF PROBATION MATTER WILL BE CONTINUED TO THAT DATE, AS WELL.

(AN ADJOURNMENT WAS TAKEN UNTIL SEPTEMBER 12, 1987.)

APPENDIX C

Related Appeal Pending
B033753

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

In the Matter of -	)
	)
	)
CHARLES BLAND, JR.,	)
	)
Petitioner,	)
	)
On Habeas Corpus.	)
	)

PETITION FOR HABEAS CORPUS

John Ward
Post Office Box 27470
Oakland, California 94602-0970
(415) 763-4261

Attorney for Petitioner

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

In the Matter of	)
	)
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	)
	)
	)
CHARLES BLAND, JR.,	)
	)
Petitioner,	)
	)
On Habeas Corpus.	)
	)

PETITION FOR HABEAS CORPUS

TO: THE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE:

Petitioner, CHARLES BLAND, JR., by and through his attorney, petitions for a writ of habeas corpus and by this verified petition states as follows:

I

Petitioner is unlawfully incarcerated by the California Department of Corrections pursuant Superior Court of the State of California, County of Los Angeles, Case No. A918091.

II

Petitioner is serving a term of life imprisonment plus seven years following conviction for the attempted murder of Alan Moreno (Pen. Code, § 664/187) (Count 1) and assault upon Thomas McGhee with a firearm (Pen. Code, § 245, subd. (a)(2) (Count 2)). It was alleged and found to be true that petitioner personally used a firearm in the commission of the offenses. (Pen. Code, §§ 1203.06, subd. (a)(1); 12022.5.) It was further alleged that petitioner inflicted great bodily injury upon the victim Moreno. (Pen. Code, § 12022.7.)

III

A timely appeal of the judgment and sentence of the court below was taken, and is currently pending before this Court. (People v. Charles Bland, Jr., Court of Appeal No. B033753.)

IV

Petitioner suffers from illegal restraint because upon trial of this cause the trial court abridged petitioner's federal and state constitutional rights of due process and the assistance of counsel when it deprived him of the right to freely chosen retained counsel and the right to

be heard on a request for change of counsel. (U.S. Cont. Amend. VI, XIV; Cal. Const., art. 1, §§ 1, 7, 15; see Code Civ. Proc., § 284.) The trial court unreasonbly refused petitioner's request to discharge retained counsel, Ronald Anderson, and unreasonably failed to afford petitioner a meaningful hearing on his request. As a result of the trial court's abridgment of petitioner's aforementioned rights, petitioner suffered prejudice because he was forced to accept the services of retained counsel, Ronald Anderson, whose representation of petitioner was grossly ineffective, to the point that Anderson abandoned his representation of petitioner without excuse and was subsequently disbarred for his negligent representation of petitioner. (See Memorandum of Points and Authorities, Arg. I, and attached exhibits, all incorporated herein by reference.)

V

Petitioner further suffers from illegal restraint because upon trial of this cause he was deprived of due process of law under the Sixth Amendment to the United States Constitution and Article I, section 15 of the California Constitution and to the effective assistance of counsel. The quality of representation provided to petitioner by his attorney at trial, Ronald Anderson, fell measurably below the accepted professional standard for counsel and this deficiency prejudiced petitioner.

VI

Specifically, Anderson unreasonably failed to provide petitioner with effective assistance in the following

particulars:

a. Anderson unreasonably failed to properly investigate and present a crucial, potentially meritorious defense available to petitioner. A number of percipient witnesses to the incident for which petitioner was convicted told the police that another individual, Shawn Gaskin[1/], was the person responsible for the crimes with which petitioner was charged. Despite the fact that the Public Defender had obtained information about these witnesses and placed it in petitioner's file, which was turned over to Anderson, and despite the fact that petitioner specifically called this to Anderson's attention, Anderson failed to contact the percipient witnesses or to otherwise investigate the possibility of presenting their testimony as a defense in this case.

b. Anderson unreasonably failed to investigate the facts and research the law on the question of whether petitioner's post-arrest statement to the police should have been suppressed on the grounds that the statement was the product of an illegal arrest. Petitioner was prejudiced by this failure because Anderson's failure in this respect resulted in the withdrawal of a potentially meritorious defense. It is reasonably probable that a motion to suppress on the grounds stated above would have been successful and would have resulted in a more favorable result for petitioner.

c. Anderson's overall performance in the conduct of petitioner's case, including but not limited to his failure to spend reasonable time in consulting with client and investigating and preparing for this serious felony case, his failure to appear in court on several occasions

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1. This individual is sometimes referred to in the record as Shawn Gascon.

and ultimate abandonment of petitioner, his failure to object to grossly improper argument by opposing counsel, and his failure to object to the admission of improper evidence, without any tactical reason therefor, undermined the integrity of the adversary process in this case to such a degree that petitioner was prejudicially deprived of the effective assistance of counsel even if it were not possible to point to specific prejudice. (See Memorandum of Points and Authorities, Arg. II, and attached exhibits, all incorporated herein by reference.)

VII

Petitioner requests the Court to take judicial notice of its file in the related direct appeal, People v. Bland, B033753, and of the points and authorities cited in the briefs therein, all of which are incorporated by reference herein.

VIII

The grounds for relief set forth in this petition, except to the extent that they are raised in the pending related appeal, have not been previously presented by this petitioner to this or any other court in any petition, motion, or application.

IX

Petitioner believes that the record on his direct appeal is sufficient to entitle him to reversal of the judgment based upon the issues raised therein, but if it is not, petitioner has no other plain, speedy, or adequate remedy at law than to raise the issues presented in this

petition.

X

This petition is being presented to this Court in the first instance pursuant to the Court's original habeas corpus jurisdiction because petitioner's appeal and the accompanying record on appeal are currently on file in this Court.

WHEREFORE, petitioner respectfully requests that this Court:

1. Consider this petition together with the related direct appeal now pending (No. B033753);
2. Issue its order to show cause to the Director of the Department of Corrections to inquire into the legality of petitioner's present incarceration.
3. In the event that this Court concludes than an evidentiary hearing is required in this matter, order a hearing to be held in Superior Court or before a referee;
4. After hearing, issue the writ vacating the judgment and order the cause remanded for a new trial; and

5. Grant such other relief as is deemed to be appropriate in the interest of justice.

Respectfully submitted,

_____

John Ward
Attorney for Petitioner

VERIFICATION

I, John Ward, state as follows:

I am an attorney admitted to practice in California and I have my office in Oakland. I am attorney for petitioner herein and am authorized to file this petition. Petitioner is unable to make verification because he is absent from Oakland by reason of his confinement in San Diego, California. For that reason I make this verification on petitioner's behalf.

I have read the foregoing petition and verify that all the facts alleged therein are supported by citations to the record or by declarations attached hereto.

I certify under penalty of perjury that the foregoing is true and correct.

Executed at Oakland, California on this 5th day of July, 1990.

_____

John Ward

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

In the Matter of	)
	)
	)
	)
Charles Bland, Jr.,	)
	)
Petitioner,	)
	)
On Habeas Corpus.	)
	)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

The facts and procedural history of this case are set forth in the related direct appeal currently pending before this Court. (People v. Charles Bland, Court of Appeal No. B033753.) Petitioner respectfully refers the court to his Opening Brief currently on file with this court and incorporates by reference as though fully set forth herein, the Statement of the Case and Statement of Facts set forth in his Opening Brief.

I. THE TRIAL COURT'S ERRONEOUS DENIAL, WITHOUT HEARING, OF PETITIONER'S MOTION TO DISCHARGE HIS RETAINED COUNSEL, RONALD ANDERSON, FORCED PETITIONER TO GO TO TRIAL REPRESENTED BY AN INCOMPETENT ATTORNEY AND WAS GROSSLY PREJUDICIAL.

A. Introduction.

In the opening brief in the accompanying direct appeal, petitioner has demonstrated that the trial court improperly denied petitioner's motion to discharge retained counsel, in violation of his federal constitutional right to the assistance of counsel and to due process of law, and showed that the error is grounds for reversal. (AOB 7-15.) Petitioner does not repeat this argument here, but respectfully refers the Court to the opening brief. In this petition, petitioner sets forth matters outside the record to demonstrate that petitioner did all that he reasonably could to rid himself promptly of the services of Ronald Anderson after it became apparent that Anderson was not going to provide him with adequate representation, and that petitioner suffered demonstrable prejudice from being forced to go to trial with Anderson as his lawyer.

B. The Facts.

1. Mr. Anderson's Negligent Preparation.

Petitioner's father believed[2/] that petitioner would be better served by a private lawyer in this serious case. He was referred to Mr. Ronald Anderson by the firm of Jacoby & Meyers. Mr. Bland, Sr., paid Mr. Anderson $1000.00 "up front", and agreed to pay another $1000.00 before trial and $100.00 per month until the full fee of $3000.00 was paid. When Mr. Bland went to see Mr. Anderson, the Public Defender had already done discovery and Mr. Bland handed the Public Defender's file over to Mr. Anderson, pointing out to him that the file contained the names of several witnesses who identified another individual, Shawn Gaskin, as the perpetrator of the crimes of which petitioner was convicted. (Exhibit A [Declaration of Charles Bland, Sr.].)

Mr. Anderson, it appears, never contacted these crucial witnesses, and he contemptuously dismissed petitioner's inquiries as to why he did not do so. (Exhibit B [Declaration of Charles Bland, Jr.].)

Not only did Mr. Anderson fail to take reasonable steps to investigate a crucial defense, it appears that he did virtually nothing else of any substance other than collect his fee and attempt to pressure petitioner into plea bargaining. (See Exhibit B.) He spoke to petitioner for no more than a half hour outside of court, and did nothing to prepare petitioner for his testimony or otherwise prepare for the case during the 9 months

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2. This belief is an widespread as it is often unfounded.

that petitioner was in jail awaiting trial. (Ibid.; see RT 5; CT 106.) In June, 1987, petitioner's father became so concerned about Mr. Anderson's deficient performance that he attempted to obtain other counsel. He was unsuccessful in that attempt because he could not afford the fees asked by other counsel. (Exhibit A.) Mr. Anderson, as the record reflects, never sought to withdraw his appearance. (ART 3-4.) He never called to see if other counsel had in fact taken the case, despite the fact that petitioner's father called and left a message that this had not happened. (Exhibit A.) Mr. Anderson even had the temerity to ask petitioner's father for an additional $200.00 when petitioner's father asked him for the file. (Ibid.)

When petitioner's case was called for trial on July 20, 1987, Mr. Anderson's did not appear in court. He did not appear that afternoon, claiming that he had been unaware that he was still in the case. As any criminal lawyer knows, once an appearance is filed, as it was in this case, the attorney is "in the case" in a criminal matter unless and until the court specifically releases him or her. Consequently, Mr. Anderson's claim that he did not know he was still in the case is nonsense. It was his job to make sure that he was either properly relieved or that he was prepared to go to trial. Mr. Anderson's lame attempt to evade this serious responsibility by shifting it onto petitioner's father is a good indication of why the trial judge should have granted the request of petitioner's father, made on July 20, 1987 (Exhibit A), and of petitioner, made on August 14, 1987 (ART 8-9), to discharge Mr. Anderson in this case. If any further indication of the grounds for petitioner's dissatisfaction were needed, Mr. Anderson certainly provided them when he failed to appear on August 14, 1987 and he

was held in contempt and a warrant and body attachment were issued to secure his appearance. (ART 8.)

2. Mr. Anderson's Incompetent Performance at Trial.

Mr. Anderson's failure to prepare adequately for this case was made obvious by the incompetence of his performance at trial.

At the Penal Code section 1538.5 hearing that preceded the trial in this case (RT 3 et seq.), Mr. Anderson made a doomed attempt to show that petitioner's confession that he was an aider and abettor was involuntary, but he did not even explore the far more fruitful issue of whether there was probable cause to arrest petitioner, despite the fact that a number of witnesses identified the perpetrator of the shooting not as petitioner but as Shawn Gaskin. (PX 73; RT 40; CT 228.[3])

The police later decided that it was not Gaskin but petitioner who was the perpetrator of the crimes charged in this case, after overhearing a telephone conversation between Gaskin and petitioner. But petitioner's telephone conversation with Gaskin clearly did not establish probable cause to arrest him. Petitioner merely said that he was glad that Gaskin was not present at the crime, and told Gaskin that no one was killed. The latter information hardly establishes consciousness of guilt since the shooting occurred on a

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3. The probation report (CT 228) erroneously states that appellant, in his conversation with Gascon, admitted the shooting. This is clearly not the case. (See RT 54.)

busy street corner and was witnessed by a number of people. (See RT 40.) Nor is probable cause established by the fact that petitioner told Gascon that he was leaving "the area or location." (RT 54.) There is nothing that links this move with the shooting.

If petitioner's arrest was not supported by probable cause and hence illegal, his inculpatory statement to the police after his arrest was, as petitioner will demonstrate more fully, in Argument II, post, suppressible on Fourth Amendment grounds, despite Miranda[4] warnings. (See Brown v. Illinois (1975) 422 U.S. 590, 601-602 [95 S.Ct. 2254, 45 L.Ed.2d 416].) Mr. Anderson never sought to explore this question, a failure that is in itself ineffective assistance of counsel. (See People v. Ledesma (1987) 43 Cal.3d 171, 227.)

In addition, Mr. Anderson failed to call any of the numerous[5] witnesses who initially identified Shawn Gascon as the perpetrator to establish reasonable doubt as to the identity of the perpetrator, or to corroborate petitioner's claim that, despite what he allegedly told the police, he was not at the crime scene.

Mr. Anderson failed to object to the admission of gang related evidence or to move in limine for its exclusion. The police officer who testified that petitioner was a gang member was never qualified as an expert, and the only evidence that petitioner was a gang member other than the officer's say-so was the hearsay evidence from this officer that petitioner had been the subject of a field identification as a gang member. (RT 64.)

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4. Miranda v. Arizona (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

5. See CT 228.

Despite this, and despite the extreme prejudice that juror knowledge of gang membership entails (see, e.g., People v. Cardenas (1982) 31 Cal.3d 897, 904-905), Mr. Anderson took no action to attempt to exclude gang evidence. Indeed, he permitted the testifying police officer to testify that he had photographed petitioner in connection with alleged gang activity at the high school petitioner attended, with absolutely no indication that petitioner was involved in the activity in question. (RT 70-71.)

In closing argument, the prosecutor told the jury that if petitioner was at the scene of the crime, he was guilty. (RT 142.) Mr. Anderson did not object to this outrageous misstatement of the law.

Mr. Anderson's performance in these instances was so deficient that petitioner, who was not disruptive at all, felt constrained to interrupt the jury instructions to say, "Your honor, I have evidence in my defense that was not presented. I would like to ask why." (RT 172.) The trial court told the jury to disregard petitioner's statements.

C. Mr. Anderson's Abandonment of Petitioner And Subsequent Disbarment.

After appellant was convicted, Mr. Anderson failed to appear at sentencing. It was learned that his telephone had been disconnected. The court found that Mr. Anderson had abandoned his representation of appellant and appointed the Public Defender to represent him. (ART 65-66.) The matter was continued for a week for sentencing. (ART 67.) Subsequently, the Public Defender declared a conflict and a new attorney was appointed pursuant to Penal Code section 987.2.

(CT 183.)

Petitioner's father brought a complaint with the State Bar against Mr. Anderson based on his incompetent representation in petitioner's case. (Exhibit B.) The State Bar, after hearing, ordered that Mr. Anderson be disbarred as a result of his conduct in petitioner's case, and that order has become final. (Exhibit C [Declaration of Attorney John Ward].) Appellate counsel for petitioner has unsuccessfully tried to contact Mr. Anderson.

D. The Prejudice.

In the opening brief filed in connection with the related direct appeal in this case, petitioner has demonstrated that the trial court's failure to grant petitioner's motion to discharge Mr. Anderson or to give him a reasonable opportunity to be heard on this motion requires reversal of his conviction. (AOB 15-16.) But even if actual prejudice was required, it has been abundantly shown here. This case is a classic example of the "bleed 'em and plead 'em" approach of the shyster lawyer, who exacts a fee and then attempts to avoid earning it by pressuring the client to plead guilty regardless of the defenses the client may have. In this case, the level of Mr. Anderson's neglect ultimately reached total abandonment of his client, but before that culminating act of malpractice, Mr. Anderson failed to prepare for trial or to put on meaningful defense. As petitioner shows in Argument II, post the incompetence of Mr. Anderson was sufficient to call into question the integrity of the adversary process in this case; forcing petitioner to accept the incompetent representation provided by Mr. Anderson was prejudicial under any

standard of prejudice, and the writ must be granted unless relief is granted on direct appeal.

II. PETITIONER WAS PREJUDICIALLY DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

A. Effective Assistance of Counsel is Mandated by both the California and United States Constitutions.

Under the state and federal constitutions (U.S. Const., Amend. VI; Cal. Const., art I, sec. 15), petitioner had the right to expect that trial counsel would make "a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (People v. Ledesma (1987) 43 Cal.3d 171, 215 (citations omitted).) "If a counsel fails to make such a decision, his action - no matter how unobjectionable in the abstract - is professionally deficient." (Ibid.)

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process, that the trial cannot be relied on as having produced a just result." (Strickland v. Washington (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

"[A] fair trial is one in which the evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." (Id. at p. 685.) Counsel's role at trial is "to ensure that the adversarial testing process works to produce a just result under the standards governing the decision." (Id. at p. 687.)

In order to establish prejudicial ineffective assistance of counsel a petitioner must meet a two pronged test.

First, he must establish that his counsel's performance was deficient. "Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.'" (People v. Ledesma, supra, 43 Cal.3d at p. 216.)

Second, a petitioner must be able to show that he was prejudiced by his counsel's ineffective assistance. Normally, this means that must establish that "there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." (Id., at p. 218.) However, where, as here, the cumulative effect of trial counsel's failure to prepare, to investigate, to object, to present meritorious motions and exculpatory evidence is such that it resulted in a breakdown in the adversary process, a conviction must be vacated even in the absence of specific prejudice. (See United States v. Cronic (1984) 466 U.S. 648, 656-659 [104 S.Ct. 1338, 80 L.Ed.2d 657]; People v. Ledesma (1987) 43 Cal.3d 171, 242 [conc. opn. of Grodin, J., joined by Lucas, J., and Panelli, J.].)

In the present case, as petitioner will demonstrate, petitioner suffered both specific prejudice from Mr. Anderson's failings, and the less tangible but equally real prejudice that results when counsel's shortcomings; taken together, cause a breakdown in the adversary system.

B. The Failure to Investigate and Present the Evidence that Shawn Gaskin Was the Perpetrator.

Included in the Public Defender's file that petitioner's father turned over to Mr. Anderson was the Inglewood Police Report which stated that one of the victims and five eyewitness named Shawn Gaskin and not petitioner

as the perpetrator of the crimes of which petitioner was convicted. (Exhibit D [Inglewood Police Department Crime/Arrest Report], p. 14.) To the best of petitioner's knowledge, and to the best of the knowledge of petitioner's father, Mr. Anderson never interviewed any of these witnesses and never called any of them as witnesses.

Where trial counsel wholly fails to investigate a potentially meritorious defense, and as a result the defense is withdrawn, the reviewing court does not speculate on the effect of counsel's omissions but instead presumes prejudice, if the defendant can make a showing that the defense that was rejected was indeed potentially meritorious. (People v. Williams (1988) 44 Cal.3d 883, 943.) Even without such a presumption, it is clear that there was prejudice here. The police may have decided that it was petitioner and not Gaskin who shot the victims (see RT 52-53), but it does not need extended argument to see that evidence that a number of eyewitness spontaneously stated right after the crime that Gaskin was the perpetrator would likely have raised sufficient reasonable doubt in the mind of the jury to result in petitioner's acquittal. Trial counsel's failure to investigate and present this evidence resulted in the withdrawal of a crucial, potentially meritorious defense, and was thus prejudicial to petitioner. (See e.g, People v. Frierson (1979) 25 Cal.3d 142, 162-164; see also Crisp v. Duckworth (7th Cir. 1984) 743 F.2d 580, 583, cert. denied, 469 U.S. 1226 [failure to investigate, by itself, is strong evidence of failure to provide minimally competent assistance].).)

C. The Failure to Move to Suppress Petitioner's Statement to the Police on the Grounds that it Was the Fruit of An Unlawful Arrest.

After petitioner was arrested, he told the police the arresting officer at the time of his arrest that he was not involved in the shootings, that he was not present. (RT 53.) After being advised of his rights, petitioner made a further statement to the police, in which he said that he had been with Desi Waller and Darren Wanamaker in the back seat of a blue Suzuki jeep on the afternoon of the shooting. (RT 59.) The three exchanged words with some Inglewood Family gang members that afternoon, and rocks and bottles were thrown at them. Petitioner took Waller and Wanamaker to his house, where petitioner picked up a .38 caliber revolver which he had stored there. (RT 60.) The three returned to the area of Crenshaw and Manchester, where they saw some people who had been involved in throwing rocks and bottles at them earlier, and, according to petitioner, Desi Waller fired on them about four times. (RT 60-61.) Waller dropped him off and kept the gun. (RT 61.) Petitioner told the police knew that a young Mexican had been shot, and he had seen a young man whom he knew as Thomas drop to the ground. (RT 61-62.)

This statement, if the jury believed that petitioner made it, was a confession of guilt as an aider and abettor, as the prosecutor argued in closing. (RT 129-130.)

Based on the trial record - and there is no reason to believe that the record offers anything less than a full account of the circumstances of petitioner's arrest - it is clear that there was no probable cause to arrest petitioner. The basis for the arrest was a conversation

that petitioner had with Gaskin, the original suspect, which was monitored by the police. In the course of this conversation, appellant told Gaskin that he was glad that Gaskin was not at the shooting and also told him that none of the "slobs"[6] got "plugged." (RT 53, 98.) Given the fact that there were a number of witnesses to the shootings, it is not surprising, and certainly not sufficient for probable cause, that petitioner knew some details about the shooting. Likewise, petitioner's expression of satisfaction that Gaskin was not present may weaken the case against Gaskin, but it does not give rise to probable cause to believe that petitioner was responsible for the shootings.

The conversation between Gaskin and petitioner may have given rise to suspicion, but it did not give the state sufficient evidence to justify the warrantless detention of petitioner. (See People v. Bower (1979) 24 Cal.3d 638, 644 (state bears burden of presenting evidence justifying warrantless detention).)

It is black letter law that the testimonial fruits of petitioner's unlawful arrest were required to be suppressed. (Brown v. Illinois, supra, 422 U.S. at pp. 601-602 [95 S.Ct. 2254, 45 L.Ed.2d 416].) Trial counsel's failure to bring a motion to suppress canot be justified by any conceivable tactical reason and was prejudicial ineffective assistance of counsel. (People v. Stratton (1988) 205 Cal.App.3d 87, 93-94; see People v. Guizar (1986) 180 Cal.App.3d 487, 492, fn. 3.)

---

6. Without objection, the prosecution asked appellant "if you are going to sit here and tell me you don't know what a slob is, a Crip term for a Blood?" Appellant replied, "I can't say." (RT 98.)

D. The Cumulative Effect of the Failures of Counsel At Trial.

As petitioner has previously shown, trial counsel failed in other respects to perform at the level of competence that might reasonably be expected of a criminal trial attorney. Mr. Anderson failed to object to the admission of gang related evidence or to move in limine for its exclusion, despite the fact that there was a paucity of admissible evidence to establish petitioner's gang membership.

In closing argument, the prosecutor told the jury that if petitioner was at the scene of the crime, he was guilty. (RT 142.) Mr. Anderson did not object to this outrageous misstatement of the law, and as a consequence there was no admonition to the jury to disregard the prosecutor's statement. (See People v. Green (1980) 27 Cal.3d 1, 28.)

In addition, trial counsel put petitioner on the stand with no preparation, and no discussion with petitioner as to the tactical advantages and disadvantages of this step. (Exhibit B.) It can be argued that each of the foregoing errors and omissions on Mr. Anderson's part was prejudicial ineffective assistance of counsel. Cumulatively, these failures, coupled with Mr. Anderson's lack of adequate preparation, his withdrawal through failure to investigate of petitioner's crucial defenses, and his post-trial abandonment of petitioner, signal a breakdown in the adversarial process that calls into question the basic integrity of the process and requires that petitioner's conviction be vacated and a new trial ordered. (See United States v. Cronic, supra, 466 U.S. at pp. 656-659 [104 S.Ct. 1338, 80 L.Ed.2d 657]; People v. Ledesma, supra, 43 Cal.3d at p. 242 [conc. opn. of

Grodin, J., joined by Lucas, J., and Panelli, J.J.)

CONCLUSION

For all the foregoing reasons, this Court should:

1. Consider this petition together with the related direct appeal now pending (No. B033753);
2. Issue its order to show cause to the Director of the Department of Corrections to inquire into the legality of petitioner's present incarceration.
3. In the event that this Court concludes than an evidentiary hearing is required in this matter, order a hearing to be held in Superior Court or before a referee;
4. After hearing, issue the writ vacating the judgment and order the cause remanded for a new trial; and
5. Grant such other relief as is deemed to be appropriate in the interest of justice.

Respectfully submitted,

John Ward
Attorney for Petitioner

EXHIBIT A

Related Appeal Pending
B033753

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

In the Matter of	)
	)
	)
	)
CHARLES BLAND,	)
	)
Petitioner,	)
	)
On Habeas Corpus.	)
	)
	)

DECLARATION OF CHARLES BLAND, SR.

1. I am the father of the petitioner in the above case.

2. I was referred to Attorney Ronald Anderson by the firm of Jacoby & Meyers. My son was originally represented in this case by the office of the Public Defender, but I felt he would be better off with a private lawyer, so I contacted Mr. Anderson.

3. I met with Mr. Anderson on or about April

7, 1987. He agreed to represent my son for a fee of $3000.00. I paid him $1000.00, and agreed to pay him another $1000.00 before trial and $100.00 per month. At this meeting, I turned over my son's file, which had been given to me by the Public Defender who was originally appointed to represent my son. I looked through the file and saw that the police report, which is attached to this declaration, was part of the file. This report contains the name of several witnesses, including teachers, who told the police that the person who did the shooting of which my son is accused in this case was Shawn Gaskin. I specifically told Mr. Anderson about these witnesses. Mr. Anderson said he would investigate.

4. In June, 1987, my son, who was in jail awaiting trial, told me that he had only had one brief visit from Mr. Anderson since April. I spoke to Mr. Anderson about this, and about the fact that he had not contacted any of the witnesses in this case. When he was unable to give me a satisfactory explanation for the way he was handling my son's case, I told him that I would like to find another attorney for my son. Mr. Anderson told me that I owed him approximately $200.00 in addition to the $1000.00 I had already paid him. He said that this was for his time in reviewing the file, and in doing research and investigation. To the best of my knowledge, Mr. Anderson did not do any research, and did not talk to any of the witnesses. Mr. Anderson gave me my son's file at the time of the June meeting.

5. Immediately after obtaining my son's file, I went to see another attorney who had been recommended to me, John Cheroske, in Torrance. Mr. Cheroske told me that he would be too expensive for me. He suggested that I have Mr. Anderson call him for assistance in Mr. Anderson's handling my son's case.

I called Mr. Anderson and left him a message telling him that Mr. Cheroske was not going to take the case and asking him to call Mr. Cheroske. As far as I know, Mr. Anderson never called Mr. Cheroske.

6. I continued to try to reach Mr. Anderson without success after my meeting with Mr. Cheroske. I could not reach him by telephone, and when I went to his office on several occasions in person during business hours, the office would be closed.

7. On the morning of July 20, 1987, I went to court on my son's case. Mr. Anderson did not appear. I asked the judge, on behalf of my son, to take Mr. Anderson off the case, but the judge would not do this. I called Mr. Anderson's office and reached him. I told him that the judge told me to tell him to come to court because his name was still on the case. Mr. Anderson came to court that afternoon. The judge told him that he would have to stay on the case.

8. After Mr. Anderson failed to appear for my son's sentencing, I complained to the State Bar about him. I was asked to make a deposition about Mr. Anderson's performance in my son's case, and I did so. I was later informed, in the attached letter, that Mr. Anderson was to be disbarred.

Executed under penalty of perjury this _____ day of June, 1990, at Pomona, California.

_____

Charles Bland, Sr.

EXHIBIT B

Related Appeal Pending
B033753

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

In the Matter of	)
	)
	)
	)
CHARLES BLAND,	)
	)
Petitioner,	)
	)
On Habeas Corpus.	)
	)
	)

DECLARATION OF CHARLES BLAND, JR.

1. I am petitioner in the above case.

2. My father, Charles Bland, Sr., hired Ronald E. Anderson to represent me on the charges of attempted murder and assault on which I was convicted in the related direct appeal, People v. Bland, No. B033753.

3. I first met Mr. Anderson at my arraignment.

We spoke very briefly - five minutes at most - at that time. Mr. Anderson came to see me once in the Los Angeles County Jail, and spoke to me for about 15 or 20 minutes. We introduced ourselves and went over what the charges were, and that was all. My only other contact with Mr. Anderson was in court, and it was brief. Mr. Anderson did not show up in court on at least two occasions that I remember. When he did not show up for my sentencing the judge finally appointed a new lawyer to represent me.

4. From the time of my second court appearance, Mr. Anderson pressured me to plea bargain this case, and he did not appear interested in helping me if I went to trial. I know he had the police reports which indicated that about seven witnesses to the shootings of which I was convicted, including two teachers, identified another person, Shawn Gaskin, as the shooter. Mr. Anderson told me on one occasion that this was a very important piece of evidence, but to my knowledge he never contacted any of the eyewitnesses or attempted to interview them. When I asked him why he did not do so, his responses was, "What are you, a jailhouse lawyer?" He did otherwise explain himself to me, and he also told me that he needed more money from my parents. I felt that Mr. Anderson was not concerned about helping me with my case, and I spoke to him, to my parents, and to the judge about getting a new lawyer.

5. Mr. Anderson asked me during the trial if I would mind taking the stand, and he called me as a witness. He did not spend any time preparing me take the witness stand or going over my testimony.

Executed under penalty of perjury this 1st day of May, 1990, at San Diego, California.

_____

Charles Bland, Jr.

EXHIBIT D

Related Appeal Pending
B033753

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

In the Matter of	)
	)
	)
	)
CHARLES BLAND,	)
	)
Petitioner,	)
	)
On Habeas Corpus.	)
	)
	)

DECLARATION OF JOHN WARD

John Ward declares as follows:

1. I am an attorney licensed to practice in California, and I am counsel for petitioner herein.

2. In December, 1988, I was contacted by an examiner for the State Bar of California, Teri Katz, who informed me that the State Bar was proceeding against Attorney Ronald Anderson, who represented petitioner in the trial giving rise to this petition based on his negligent representation of petitioner herein and requesting that I furnish a copy of the transcript of the

trial.

3. In June, 1990, I contacted the State Bar Court in Los Angeles, and was informed that Mr. Anderson has been disbarred as a result of the complaint brought by petitioner's father, Charles Bland, Sr., based on Mr. Anderson's ineffective assistance in this case.

4. I have tried without success to reach Mr. Anderson at his last known address.

Executed under penalty of perjury this 2nd day of July, 1990, at Oakland, California.

_____

John Ward

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

People of the State of California,	)	
	)	
Plaintiff and Respondent,	)	No. B033753
	)	
v.	)	(Los Angeles
	)	County
	)	Superior
Charles Bland,	)	Court No.
	)	A918091)
Defendant and Appellant.	)	
	)	

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

HONORABLE CECIL MILLS
AND HONORABLE HIROSHI FUJISAKI, JUDGES

APPELLANT'S OPENING BRIEF

John Ward
Box 27470
Oakland, CA 94602
Telephone: (415) 763-4261

Counsel for Appellant

. . . more shots. (RT 105-106.) Wanamaker said that the people who got shot at were "Bloods" but denied that the shooters were "Crips." (RT 105.)

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO PERMIT APPELLANT TO DISCHARGE HIS RETAINED COUNSEL.

A. Factual and Procedural Background.

At the preliminary hearing, and at his arraignment in Superior Court on March 18, 1987, appellant was represented by the Public Defender. (CT 1, 91.)

On May 7, 1987, Ronald Anderson, a private attorney who had been retained was substituted for the Public Defender. (CT 93.)

On May 21, the pretrial conference date, the pretrial conference was taken off calendar and a trial date of July 20, 1987 was set. (CT 94.) Bail was reduced from $200,000 to $99,000, without objection by the prosecution, and appellant was remanded to custody in lieu of bail. (Ibid.)

On the afternoon of July 20, Mr. Anderson appeared in court to explain why he had not appeared that morning. Mr. Anderson told the court:

> I did not appear this morning. Approximately four weeks ago, I was advised by Mr. Bland, Sr., that he was retaining another attorney. They gave me a name. They came and picked up the contents of the file.

I was under the understanding that someone would appear today. I got a call this morning, I guess, advising me they did not retain counsel.

That is the status of the case at this time.

THE COURT: The matter is here for trial. Are you ready for trial?

MR. ANDERSON: No, your Honor.

I stopped working on the trial four weeks ago. I had just subbed in approximately three weeks before.

I had just received the discovery material, and I turned all that over to the father who advised me he had retained an attorney.

Also, I am trailing for trial on another matter.

THE COURT: What is your pleasure on this matter, sir?

MR. ANDERSON: Well, at this point in time as to my status, obviously, since the Court has me down --

THE COURT: You are the attorney of record at this time. I understand that.

Definitely, I would need to continue the matter in order to prepare for trial.

(ART 3-4.) The matter was then continued until August 10, 1987.

On August 10, 1987, the case was called for trial. Mr. Anderson failed to appear. The court asked appellant if he knew why Mr. Anderson was not present, and appellant told the court that he did not but that he believed Mr. Anderson was "under the impression he is no longer on the case." The court said, "How did he get that impression? I didn't relieve him." Appellant replied that he did not know. The court found Mr.

Anderson to be in contempt, and a body attachment was issued for his arrest. (CT 96; ART 6.)

On August 14, 1987, Mr. Anderson appeared and told the court that he had made a mistake about the date of trial, and apologized to the court. The bench warrant was recalled and quashed. (ART 8.)

The following colloquy ensued:

> THE COURT: Are you ready for trial?
>
> MR. ANDERSON: No, your Honor.
>
> First of all, I am trailing on another matter for trial here on Tuesday.
>
> THE COURT: What is your pleasure on this matter?
>
> MR. ANDERSON: It is my understanding that [appellant] is wishing that another attorney represent him.
>
> I guess I have a motion to be relieved as counsel, and he wants a Public Defender to represent him.
>
> THE COURT: He may wish that, but that is not going to happen.
>
> MR. ANDERSON: This is a matter in which [appellant] had advised me they had another attorney. They did not retain that attorney, and I just received the file on Saturday.
>
> I am surely not ready to go.
>
> THE COURT: When do you want it to go over to?
>
> MR. ANDERSON: September the 12th.

(ART 8-9.) It was ordered. (Ibid.)

On September 11, 1987, the matter was continued once again, to September 25, 1987, so that Mr. Anderson could prepare for trial. (CT 98.)

On September 28, 1987, Mr. Anderson sought and

obtained a continuance until October 9, 1987, on the grounds that he was engaged in another court. (CT 99.)

On October 9 and October 16, 1987, the case was continued on motion of the prosecution, due to the unavailability of witnesses. (CT 100, 102.)

On October 23, the case was called for trial. Mr. Anderson sent another lawyer to appear specially for him, and the case was continued until October 26, 1987. Appellant refused to waive time on that occasion. (CT 103.)

The case was continued or trailed twice more because the prosecution was not ready. (CT 104-105.) On October 29, 1987, the case was sent out for trial and appellant waived time so that he could present a motion pursuant to Penal Code section 1538.5. (CT 106-107.) On October 30, 1987, jury empanelment began, with Mr. Anderson representing appellant. (CT 108.)

After appellant was convicted, Mr. Anderson failed to appear at sentencing. It was learned that his telephone had been disconnected. The court found that Mr. Anderson had abandoned his representation of appellant and appointed the Public Defender to represent him. (ART 65-66.) The matter was continued for a week for sentencing. (ART 67.) Subsequently, the Public Defender declared a conflict and a new attorney was appointed pursuant to Penal Code section 987.2. (CT 183.)

B. The Law.

The motion judge's off-handed treatment of appellant's well-founded dissatisfaction with Mr. Anderson and his denial without hearing of his motion to discharge his retained counsel violated two aspects of

appellant's federal and state constitutional rights of due process and the assistance of counsel as well as his rights under California statutory law. The defendant in a criminal case has the right to discharge retained counsel, even if that will require appointment of counsel by the court, and the defendant, under all circumstances, has the right to be heard on a request for change of counsel. (U.S. Cont. Amend. V, VI, XIV; Cal. Const., art. 1, §§ 1, 7, 15; see Code Civ. Proc., § 284.)

1. The Right To Discharge Retained Counsel.

The constitutional right to effective assistance of counsel encompasses the right to discharge a retained attorney, regardless of financial ability to hire another attorney. (People v. Stevens (1984) 156 Cal.App.3d 1119, 1127; People v. Lau (1986) 177 Cal.App.3d 473, 478.) The right to discharge retained counsel is not conditioned upon the accused being able to show that new counsel is necessary to prevent impairment of effective representation. On the contrary, "[a]bsent a proper finding of unwarranted disruption of the orderly processes of justice, a court may not force a defendant who timely requests substitution to go to trial represented by retained counsel he no longer trusts."

(Id. at p. 1128)[6] As will be discussed in section 2, post, there is no basis to conclude that appellant's request to fire his retained counsel in this case would have disrupted the orderly administration of justice, or would have prejudiced appellant[7], if it had been granted. Accordingly, the trial court's action in forcing appellant to go to trial with Mr. Anderson as his lawyer violated his right to counsel.

2. The Right to a Hearing.

People v. Stevens, supra, 156 Cal.App.3d at p. 1128, and People v. Lau, supra, 177 Cal.App.3d at pp. 478-479, hold that the motion to discharge retained counsel may be denied if its timing is such that allowance of the motion would disrupt the orderly administration of justice or would be prejudicial to the defendant[8].

However, there is no question that a court that

---

6. But see South v. Superior Court (1986) 188 Cal.App.3d 1055, 1059-1060 [indigent defendant who wishes to fire retained counsel and obtain court appointed lawyer must show that continued representation by retained counsel would substantially impair right to counsel]; People v. Barnes (1983) 146 Cal.App.3d 663, 666 [same]. People v. Ortiz (Cal.App. 1989), like South, a case from the Sixth District, follows Stevens and supports appellant's position. Ortiz is currently before the California Supreme Court, a petition for review having been granted on August 10, 1989.

7. See People v. Gzikowski (1982) 32 Cal.3d 580, 586-587.

8. This factor is not present in this case, and it will not be further discussed.

denies a motion to discharge a motion to discharge retained counsel on the basis that the timing of the request is disruptive must first hear the defendant's reasons and determine that they are legally insufficient to outweigh the need for the orderly administration of justice[9]. Thus, in People v. Lau, supra, 177 Cal.App.3d 477, the trial judge held a hearing with the defendant and his counsel, in which the judge weighed the court's concern with the orderly progress of the trial against the defendant's wish to fire his retained counsel and obtain the services of the Public Defender. The judge in Lau noted that "[t]his is the very last minute. We have a jury waiting outside the door, literally, so you have to give me legally sufficient reasons to justify a substitution at this late date."[10]. (Id. at p. 477, fn. 3.) The Lau defendant explained that his lawyer thought it was in his best interests to plead guilty, whereas he wanted to go to trial. Moreover, the Lau defendant was afraid that his inability to pay his lawyer in full might affect the latter's performance. (Id. at p. 477.) The court accepted trial counsel's assurances that he would give the defendant the best possible representation, and denied the motion. (Id. at p. 479.) The Court of Appeal found no error in the manner in which the trial court struck the balance,

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9. Even the cases that analogize the request of an indigent defendant to fire retained counsel and obtain a court-appointed lawyer to a Marsden type request for the substitution of counsel recognize the defendant's right to be heard on the issue. (South v. Superior Court, supra, 188 Cal.App.3d at p. 1060; People v. Barnes, supra, 146 Cal.App.3d at pp. 666-667.)

10. In addition, there was a co-defendant, who had answered ready for trial.

especially given the eleventh hour timing of the request to discharge counsel.

In the present case, there was no balancing of interests, and indeed no hearing at all. The trial court's total failure to give appellant the opportunity to explain why he wanted to fire Mr. Anderson would have been error even if, as in Lau, the request to discharge Mr. Anderson had come with the jury at the door. (See People v. Barnes, supra, 146 Cal.App.3d at p. 667 [trial court must afford defendant an opportunity to explain why he or she wishes to discharge retained counsel and obtain services of Public Defender].)

In the present case, unlike Lau, "[t]here is not the slightest indication that appellant's purpose in seeking substitution" or that the time necessary for substitute counsel to prepare for trial would impair the orderly administration of justice. (People v. Stevens, supra, 156 Cal.App.3d at p. 1129.) As the record demonstrates, appellant was not trying to manipulate the court at the eleventh hour, as the hour of reckoning approached. On the contrary, he and his family had obviously been dissatisfied with Mr. Anderson almost from the beginning of his representation, and appellant's father had sought, unsuccessfully, to obtain new counsel for his son. Appellant's father gave Mr. Anderson the name of the new attorney that he had contacted. Instead of contacting the new attorney and satisfying himself that a new lawyer would in fact relieve him from a case where a trial date was looming and he was counsel of record, Mr. Anderson did nothing, and on the first scheduled trial date, showed up in court in the afternoon instead of the scheduled morning hour and blamed his lack of preparedness on appellant's father. It was not appellant's father's job to make sure that Mr. Anderson

was either relieved or ready to go on July 20, it was Mr. Anderson's. In any event, the court found no difficulty in granting a continuance to accommodate Mr. Anderson, and continued the case until August 10, when Mr. Anderson again failed to appear for at the appointed time and was held in contempt. When Mr. Anderson finally appeared on August 14, the trial court simply ignored appellant's plea that Mr. Anderson be relieved, and granted Mr. Anderson another continuance to prepare for trial. Under these circumstances, it cannot be said that disruption of the orderly administration of justice was a reason for denial of appellant's motion, in light of the ease with which Mr. Anderson, as well as the prosecution, obtained continuances after the motion to discharge him was denied.[11/] This is particularly true where, as here; appellant, who was incarcerated, had been making reasonable efforts, of which the court was aware, to obtain new counsel prior to Mr. Anderson's August 10 failure to appear. "In the circumstances, it does not appear that any dilatoriness chargeable to him was of sufficient substance to warrant the grave consequence of being required to go to trial without further opportunity to secure counsel. . ." (People v. Robinson (1954) 42 Cal.2d 741, 748; see People v. Gzikowski (1982) 32 Cal.3d 580, 589.) The trial court's complete failure to conduct even a perfunctory inquiry into the basis for and timing of appellant's request was error.

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11. Moreover, Mr. Anderson's failure to appear sent a clear signal that an inquiry into the nature of appellant's dissatisfaction with his lawyer would not have been a mere pro forma exercise.

C. The Necessity for Reversal.

The improper denial of a motion to discharge retained counsel is a deprivation of due process and requires reversal regardless of whether there was an actual deprivation of a fair trial and regardless of whether the retained counsel sought to be dismissed was competent. (People v. Stevens, supra, 156 Cal.App.3d at p. 1129; see People v. Gzikowski, supra, 32 Cal.3d at p. 589; People v. Byoune (1966) 65 Cal.2d 345, 346 [deprivation of right to obtain counsel of choice; reversal required even where counsel was competent]; see also People v. Chavez (1980) 26 Cal.3d 334, 349 (lead opn.) [reversal required where prejudice cannot be determined because prejudice cannot be determined because of total lack of hearing].)

Even if actual prejudice from the denial of the motion to fire Mr. Anderson were required to be shown in this case, it is clear that there was such prejudice. Long before Mr. Anderson literally abandoned appellant, he abandoned him in terms of more than perfunctory representation. Appellant will set forth in detail the ineffectiveness assistance of counsel provided by Mr. Anderson in a petition for a writ of habeas corpus that will be filed as soon as practicable. Appellant respectfully refers the Court to that document for specific instances of the prejudice that appellant suffered by reason of the trial court's refusal to permit him to discharge Mr. Anderson.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT THE DOCTRINE OF TRANSFERRED INTENT WAS APPLICABLE IN THIS CASE

The prosecution's theory of the case against appellant poses the following question, perhaps most usefully framed as a hypothetical:

> Where D shoots at A, an enemy, but misses A and instead accidentally hits and wounds B, a bystander, can D, who is convicted of assault . . .

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES BLAND, JR., Defendant and Appellant.	B033753 (L.A.S.C. No. A 918091)
In re CHARLES BLAND, JR., on Habeas Corpus.	B051374 (L.A.S.C. No. A 918091) ORDER

THE COURT:

The defendant having filed a petition for writ of habeas corpus on July 9, 1990 (B051374), it is ordered that said petition be considered concurrently with the above entitled appeal (B033753).

Opposition to the petition for writ of habeas corpus shall be served and filed within thirty days of the date of this order.

APPENDIX E

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES BLAND, Defendant and Appellant.	No. B033753 (Super. Ct. No. A 918091)
In re CHARLES BLAND, on Habeas Corpus.	No. B051374 (Super. Ct. No. A 918091)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hiroshi Fujisaki, Judge. Modified and affirmed; writ denied.

John Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Edward T. Fogel, Jr. Assistant Attorney General, Donald E. de Nicola and Tricia Ann Bigelow, Deputy Attorneys General, for Plaintiff and Respondent.

An innocent bystander (Moreno) was injured during a gang related drive-by shooting in Inglewood. The intended victim (McGhee) escaped unharmed. With respect to Moreno, count I of the amended information charged Charles Bland (defendant) with attempted murder, personal use of a firearm, and the intentional infliction of great bodily injury (Pen. Code, §§ 664; 187, subd. (a); 12022.5; 1203.06, subd. (a)(1); 12022.7). With respect to McGhee, count 2 charged defendant with assault with a firearm and personal use of a firearm (Pen. Code, §§ 245, subd. (a)(2); 12022.5). The jury found defendant guilty as charged. Defendant appeals, contending among other things that the doctrine of transferred intent does not apply to attempted murder. Defendant also claims in his consolidated petition for habeas corpus that he was denied effective assistance of counsel. We modify the sentence to correct a conceded miscalculation of custody credits, affirm the judgment as modified, and deny the petition.

FACTS[1/]

The evidence, viewed in the light most favorable to the judgment (People v. Barnes (1986) 42 Cal.3d 284, 303), established the following:

Desi Waller and Darren Wanamaker, who belonged to the "Rolling Sixties Crips," and defendant, who belonged to an affiliated gang, the "Neighborhood Crips," were driving in a light blue and white Suzuki Samurai jeep on February 4, 1987, the afternoon of the shooting. While they were stopped at a traffic light near Manchester and 5th, about eight people threw bottles at them. Someone in the group made a remark, "'There go that punk Desi,'" which angered Desi. McGhee, a former member of the rival "Inglewood Family Bloods," was present at this incident.[2/]

---

1. To facilitate our discussion of defendant's claims regarding his trial attorney, we will separately state the facts concerning defendant's pretrial "request" to discharge counsel and defendant's habeas petition.

2. The following evidence supports this inference: McGhee testified that he had seen Desi and Darren in the same jeep about 15 or 20 minutes before the shooting. This coincides with the bottle throwing incident described by defendant to Detective Young during defendant's post-arrest interview and also by Darren Wanamaker during his rebuttal testimony made under a grant of immunity. While neither defendant nor Darren specifically named McGhee as one of the bottle throwing group, Darren did testify that the people gathered at the bus stop were the same people who had been involved in the earlier incident.

Desi then drove with defendant and Darren to Desi's house, where Desi went in for a moment, and then to defendant's house, where defendant retrieved a gun. The gun was blue or black steel long barrel .38 caliber revolver which defendant had bought on the street a couple of months earlier. Defendant had been storing the gun in an old truck in the backyard. After defendant picked up his gun, the three drove back to Inglewood to find the group that had taunted them. At a bus stop at Manchester and Crenshaw, they found the group, which included McGhee.

One of McGhee's friends yelled, "'There is Desi and Shawn and them.'" McGhee, having had "problems" with Desi and Shawn in the past, turned to look at the jeep. Desi, who was driving the jeep, said "'What is up, cuz,'" which is a Crips gang challenge. McGhee saw the rear passenger point a ".38 or a black gun" out the window. When McGhee heard a shot go over his head, he ducked behind a trash can. Three more shots followed. One of the shots injured Moreno, a young bystander who was waiting for a bus.

The primary issue at trial was the identity of the rear passenger. McGhee testified that Desi Waller was the driver and Darren Wanamaker was the front passenger, but he could not identify the rear passenger. McGhee said the rear passenger was "dark skinned . . . with braids going back," and was wearing a

blue jacket and "blue rubber bands on the end of the braids."

On cross-examination, defense counsel attempted to establish that McGhee had previously stated that the rear passenger was Shawn. Defense counsel asked McGhee: "Now, isn't it true that when you talked to the officers, you told them that Desi Waller and Shawn Gascon and Darren were in the jeep?" McGhee responded in the negative and after a follow-up question, stated: "No. I saw Desi and Darren was in the jeep. Everybody was saying Shawn was in the jeep." McGhee had known Darren for about a year and Shawn for about two or three years and had gone to school with Desi and defendant. McGhee described Shawn as a "[d]ark skinned, kind of big, about six" foot tall person with hair that was either "press[ed] and curled" or braided.

Detective Young testified that he had initially arrested Shawn Gascon, but released him after interrogation and arrested defendant. In particular, Young was persuaded of defendant's guilt when Shawn made "a return phone call to the defendant . . . with [the police] monitoring and taping that phone call."

Detective Young testified to defendant's admissions which were obtained during post-arrest interrogation. Defendant said he was in the back and Desi and Darren were in the front of the jeep during the shooting. Defendant admitted he had previously purchased and hidden the gun which was used in the shooting. Defendant also described the details of the earlier bottle throwing incident and of his subsequent retrieval of the gun. However, defendant denied firing the gun. Defendant claimed he had handed the gun to Desi, the driver, who did the shooting.

But at trial, defendant denied making these admissions. He specifically denied telling Detective Young that he was in the jeep or that he had retrieved the gun before the shooting. Defendant also categorically denied any gang membership, any participation in the shooting, and ownership of the gun.

Defendant's direct testimony suggested that the real culprit was Shawn Gascon, whom defendant described as being six feet tall with a dark complexion and curly or permed hair. Defendant denied that he had recently cut his hair as Detective Young had testified. Defendant also denied that the photograph taken of him by Detective Young, which showed his hair to be in a "longer jheri curl," was taken only two weeks before the shooting as Young had testified. According to defendant, the photograph was actually taken one year earlier in

February 1986.

On cross-examination, the prosecutor pointed out that despite defendant's disavowal of gang membership, defendant was wearing a blue jacket in his arrest photograph and was wearing blue shoelaces at trial. Detective Young had previously testified that blue was the color worn by Crips. The prosecutor also brought out defendant's prior plea of guilty to a charge of receiving stolen property.

Defendant further testified on cross-examination that he had left his mother's house late on the night of the shooting to go to his brother's house. Defendant explained that he had moved to his brother's house in the middle of January, but continued to go to his mother's house. (The shooting occurred on February 4, 1987.)

In addition, the prosecutor questioned defendant about his tape recorded telephone conversation with Shawn Gascon, which Detective Young had mentioned only in general terms. Defendant acknowledged that Shawn had called him at his mother's house at about 10 p.m. on the night of the shooting. Defendant testified: "I told [Shawn] I knew he didn't have anything to do with it. So, I was glad he wasn't arrested." Defendant further admitted telling Shawn the shooting victim was Mexican and did not die. Defendant also confirmed he had told Shawn that he was about to leave his mother's

house. Defendant stated he "may have" told Shawn that he could not talk over the telephone and did not want to tell him where he was going.

Over defendant's objection, the prosecutor played the tape recording of defendant's telephone conversation with Shawn Gascon. At one point, the prosecutor stopped the tape and asked defendant: "What did you mean by none of them slobs got plugged?" Defendant replied: "I can't say." The prosecutor then asked: "Do you know what a slob is?" When defendant replied that a "slob" is a "fat person," the prosecutor retorted: "A fat person. You are going to sit here and tell me you don't know what a slob is, a Crip term for a Blood?" Defendant again responded: "I can't say."

On direct examination, defendant explained he had learned of the shooting at about 5:30 that afternoon during a telephone conversation with "a female" named "Leah," who is a friend of his fiancee, Louisa Major. Defendant's fiancee, who testified for the defense, confirmed this was true. Louisa stated that she was speaking on the telephone with defendant when Leah called; and during their three-way conversation, Leah had related the details of the shooting.

In rebuttal, Darren Wanamaker testified for the prosecution under a grant of immunity. Darren described the bottle throwing incident which had precipitated the shooting. When Darren, Desi and defendant went to defendant's house, Darren did not leave the jeep. Darren did not see the gun prior to the shooting. Darren asked to be taken home, but Desi instead "went looking for them." They drove to Manchester and Crenshaw, where they spotted the rival group. When they pulled into the alley, someone in the rival group said, "'There he go again,'" and the rival group started to run toward the jeep. Defendant, who was sitting in the back, fired two shots from a black revolver. Darren denied that he, Desi, Shawn and defendant were gang members. However, Darren explained that a "slob" is "a Blood."

After the jury found defendant guilty as charged, defense counsel (Ronald Anderson) failed to appear at the December 1, 1987, sentencing hearing. Defendant's father informed the trial court that Anderson's office was closed and his telephone was disconnected. The court clerk confirmed that the telephone was disconnected. The court then appointed the public defender to the case. After the public defender's office declared a conflict of interest, private counsel was appointed at the December 7, 1987, hearing and the matter was continued. The trial court ordered the clerk to mail a

copy of the transcript of the December 1 and 7 hearings to the State Bar.

ISSUES

Defendant claims on appeal that the trial court erred in (I) denying his motion to discharge retained counsel, (II) instructing on transferred intent, (III) failing to give unrequested additional instructions concerning the testimony of an accomplice, (IV) instructing on the adverse inference to be drawn from a defendant's failure to explain or deny any evidence, and (V) calculating custody credits.

In his petition for habeas corpus, defendant contends (VI) he was denied effective assistance of counsel.

DISCUSSION

I

Defendant contends the trial court's "denial" of his "motion" to discharge his retained counsel in favor of appointed counsel was error. While we agree with defendant's general assertion that a defendant may discharge his retained counsel even if that will require appointment of counsel by the court, we conclude no unequivocal, timely request was made in this case.

Defendant relies on the following evidence: Defendant's retained counsel, Ronald Anderson, had been hired by defendant's father. The case was set for trial on July 20, 1987, but Anderson failed to appear. That afternoon, Anderson appeared before the trial court and explained: "I did not appear this morning. Approximately four weeks ago I was advised by Mr. Bland, Sr., that he was retaining another attorney. They gave me a name. They came up and picked up the contents of the file. [¶] I was under the understanding that someone would appear today. I got a call this morning, I guess, advising me they did not retain counsel. [¶] That is the status of the case at this time." Based on this representation, the court continued the trial to August 10, 1987.

On the appointed date, Anderson again failed to appear. Defendant, when asked whether he could explain Anderson's absence, stated: "No. I believe he is under the impression he is no longer on the case." Defendant claimed he did not know, however, what had given Anderson that impression. The trial court issued a bench warrant.

When Anderson appeared in court on August 14, 1987, he accepted blame for miscalendaring the trial date. Anderson further stated he was not ready for trial. Anderson said: "First of all, I am trailing for [another] trial here on Tuesday," and second, "[i]t is my

understanding that the defendant is wishing that another attorney represent him. [¶] I guess I have a motion to be relieved as counsel, and he wants a public defender to represent him."

This was the extent of defendant's "motion." The court replied: "He may wish that, but that is not going to happen." Anderson then stated: " This is a matter in which the defendant had advised me they had another attorney. They took the file away from me to another attorney. They did not retain that attorney, and I just received the file on Saturday. [¶] I am surely not ready to go." The court then rescheduled the trial.

On this meager showing, we find no abuse of discretion. The equivocal, uncertain nature of Anderson's statement did not properly bring the issue of substitution of counsel to the trial court's attention. Moreover, even assuming the request was unequivocal, it was not timely. While defendant may have wished to secure other counsel about four weeks before the original July 20 trial date, he failed to do so. By the time Anderson said he "guess[ed]" he had a motion to substitute counsel, the second August 10 trial date had also passed. Both delays can be attributed in large part to the fact that defendant, after leading Anderson to believe he was not on the case, had failed to tell Anderson that he was back on the case. Anderson was not given back the file until a few days before the

August 14 hearing. In this context, Anderson's vague statement, that he "guess[ed]" he had a motion to substitute counsel after two scheduled trial dates had lapsed, could hardly be considered a timely motion. The trial court's retort aptly reflected its frustration and disapproval of defendant's transparent attempt to arbitrarily substitute counsel to cause even further delay.

The constitutional right to counsel of one's choice may be forced to yield when its enforcement would cause an unreasonable disruption in the orderly trial process under the circumstances of the particular case. (People v. Courts (1985) 37 Cal.3d 784, 790.) "The right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration . . . .' (People v. Byoune [1966] 65 Cal.2d [345], 346.)" (People v. Courts, supra, 37 Cal.3d at p. 790.) The trial court, in its discretion, may deny a continuance where the defendant arbitrarily seeks to substitute counsel at the time of trial. (Id. at pp. 790-791.) Under the facts of this case, we find no abuse of discretion.[3/]

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3. The California Supreme Court recently decided that a defendant who brings a timely motion to discharge retained counsel should not be required to prove his retained counsel was incompetent under People v. Marsden (1970) 2 Cal.3d 118, 126, thereby resolving a conflict between People v. Stevens (1984) 156 Cal.App.3d 1119 (Marsden does not govern the discharge of retained counsel), and two contrary decisions, (People v. Barnes (1983) 146 Cal.App.3d 663 and South v. Superior Court (1986)

II

. . .

188 Cal.App.3d 1055 (Marsden does govern the discharge of retained counsel). (People v. Ortiz (Nov. 16, 1990, S010851) ___ Cal.3d ___ [slip opn., pp. 9-20].) Marsden was not raised or discussed below. In any event, Marsden and Ortiz are inapplicable because the trial court properly found defendant's request was untimely and unduly disruptive.

. . .

V

The trial court awarded defendant 337 days of custody credit and 186 days of conduct credit, for a total of 505 days of credit. Defendant contends and the People concede that defendant is entitled to 373 rather than 337 days of custody credit since he is entitled to credit for each calendar day, or fraction thereof, in custody. (People v. Scroggins (1987) 191 Cal.App.3d 502, 508.) We agree. Defendant was arrested on February 17, 1987, and sentenced on February 25, 1988, which entitles him to 373 days of custody credit and 186 days of conduct credit.

VI

In a consolidated petition for writ of habeas corpus, defendant claims his counsel deprived him of adequate assistance by failing to (A) interview and present the testimony of several eyewitnesses who had identified the shooter as Shawn Gascon, (B) bring a motion to suppress his admissions as the fruit of an illegal arrest, and (C) object to evidence of gang membership and to the prosecutor's argument that the jury could find defendant guilty if he was "there," and not guilty if he was not "there." Defendant further contends (D) the

cumulative effect of his counsel's failure to prepare, to investigate, and to make evidentiary objections resulted in such a breakdown in the adversary process that his conviction must be reversed even without proof of specific prejudice.

A. Failure to Investigate

Defendant's first contention is related to his earlier argument on appeal that the trial court erred in denying his motion to substitute counsel.

As additional evidence, defendant has submitted a police report prepared by Officers Hammer and Clark, which named numerous eye witnesses, including McGhee, who had identified "Shawn Gaskin" as the rear passenger. Defendant claims Anderson was incompetent for failing to interview these eyewitnesses despite defendant's and defendant's father's specific requests that this be done.

Defendant has also submitted his father's declaration which states that in June 1987, the month before the original July trial date, he asked Anderson "about the fact that he had not contacted any of the witnesses in this case." During this conversation, Anderson asked for more money. Defendant's father, in turn, asked for and received defendant's file, and told Anderson he was going to hire a new lawyer. But when defendant's father found he could not afford another lawyer, defendant's

father called Anderson back and left a message "telling him that Mr. Cheroske was not going to take the case and asking him to call Mr. Cheroske." Anderson did not call Mr. Cheroske. Defendant's father continued to telephone Anderson without success, and went to Anderson's office several times during business hours but found the office to be closed. When the July 20 trial date arrived, defendant's father appeared in court and asked the judge to take Anderson off the case. When the judge refused, defendant's father called Anderson's office and informed him that the judge wished him to appear in court that afternoon. Anderson complied, but later failed to appear on August 10, 1987, due to his calendaring error. The trial finally went forward, but then Anderson failed to appear at the sentencing hearing. Thereafter, defendant's father complained to the State Bar and gave deposition testimony concerning Anderson's performance in this case. Defendant's father later received a letter informing him that Anderson was to be disbarred.

Defendant's present attorney, John Ward, has also submitted a declaration attesting to Anderson's disbarment "as a result of the complaint brought by petitioner's father, Charles Bland, Sr., based on Mr. Anderson's ineffective assistance in this case." Ward was unable to contact Anderson at his last known address.

Defendant has also submitted a declaration

concerning his dissatisfaction with Anderson. Prior to trial, when defendant asked Anderson to interview the eyewitnesses who had identified Shawn Gaskin as the shooter, Anderson replied: "'What are you, a jailhouse lawyer?'" Defendant states: "He did not otherwise explain himself to me, and he also told me that he needed more money from my parents. I felt that Mr. Anderson was not concerned about helping me with my case, and I spoke to him, to my parents, and to the judge about getting a new lawyer." Defendant further asserts Anderson spent only about 15 or 20 minutes with him before trial. Anderson first asked defendant to take the stand during trial without preparing him or going over his testimony.

"'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.]" (People v. Ledesma (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (Id. at p. 217.)

"Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (People v. Fosselman (1983) 33 Cal.3d 572, 581.)

Our analysis of the record and the additional evidence described above persuades us that defendant has failed to demonstrate inadequate assistance of counsel. We cannot say Anderson had no rational tactical purpose for the way he handled the case. While there may have been other witnesses available to identify Shawn Gaskin or Gascon, we cannot fault Anderson for failing to pursue a theory which his own client twice denied during a recorded telephone conversation and post-arrest questioning.

To his credit, defense counsel attempted to impeach McGhee by asking him whether he had originally told the police that Shawn was the rear passenger. While defense counsel did not submit the police report to impeach McGhee, we cannot say Anderson was incompetent in this regard. For at the preliminary hearing, McGhee more fully explained that by the time he had spoken with the investigating officers, the officers had already been told by others that Shawn was in the jeep. McGhee stuck to his story, as he did at trial, by insisting: "They had already say that it was Sha[w]n, but I didn't see his face."

And while defendant complains of his inadequate preparation to testify, he did manage to explain or deny all of the significant prosecution evidence as we previously discussed. Moreover, no amount of preparation could have helped defendant to explain Detective Young's damaging testimony concerning defendant's admission.

While Anderson's subsequent abandonment of defendant's case is deplorable, we cannot say that it prejudiced the outcome of the case.

B. Illegal Arrest

Defendant claims Anderson was incompetent for failing to challenge his admission as the fruit of an illegal arrest. Defendant asserts: "[D]efendant's telephone conversation with Gaskin clearly did not establish probable cause to arrest him. [Defendant] merely said that he was glad that Gaskin was not present at the crime, and told Gaskin that no one was killed. The latter information hardly establishes consciousness of guilt since the shooting occurred on a busy street corner and was witnessed by a number of people . . . . Nor is probable cause established by the fact that [defendant] told Gascon that he was leaving 'the area or location.' . . . There is nothing that links this move with the shooting."

The People contend the telephone conversation provided probable cause because defendant told Gascon facts peculiar to the shooting that "only a person present at the shooting would have known, i.e., that no one had died in the shooting, that a Mexican got shot, that he was glad Gascon was not under police suspicion because he knew Gascon was not involved with the shooting. Finally, [defendant] said he was going to leave the area and that he could not say why he was leaving or where he was going." We agree these statements, while they are not determinative of guilt, certainly provided the police with specific facts to believe defendant was involved in the shooting. Moreover, we infer from Detective Young's testimony that Gascon had identified defendant as a participant. Detective Young stated: "[Gascon] told me a number of things, such as phone calls he got from a number of people who actually were involved in the shooting. He also placed a phone call, a return phone call to the defendant that afternoon with us monitoring and taping that phone call."

Based on this record, we conclude defendant has failed to establish that Anderson was incompetent in not bringing a suppression motion. Defendant has failed to "demonstrate that counsel was ignorant of the facts or of the law and that such ignorance resulted in a withdrawal of a crucial defense." (People v. Provencio (1989) 210 Cal.App.3d 290, 303-304.)

C. Failure to Object

Defendant contends Anderson was incompetent in failing to object to evidence of gang membership, including gang terms, colors and clothing. Defendant cites People v. Cardenas (1982) 31 Cal.3d 897. Cardenas, however, lacks precedential authority because only three justices agreed that the admission of evidence of gang membership constituted error. (People v. Harris (1985) 175 Cal.App.3d 944, 957.) Evidence of gang membership is admissible for a number of purposes. (Ibid.) The test for its admission is relevance. (Williams v. Superior Court (1984) 36 Cal.3d 441, 450, fn. 8, citing People v. Perez (1981) 114 Cal.App.3d 470, 477.)

While evidence of gang membership may not be offered to prove a defendant's predisposition toward violence (People v. Luparello (1986) 187 Cal.App.3d 410, 426-427), it may properly be admitted to show motive. (Evid. Code, § 1101, subd. (b).) This was the prosecution's purpose in this case. The prosecutor argued: "Counsel said this isn't Crips versus Bloods. They are not on trial. They are not but they are. That is the motive, the motive for this otherwise senseless shooting. It does not make sense. Motive is not an element of the crime. I don't have to come in here and prove to you there is a motive to prove my case. By showing you a motive, it is further evidence that you can

use against the defendant if you feel he did indeed have that motive. [¶] Unfortunately, today, the simple difference of wearing red or blue can get you killed. It is a very sad fact of life. That while it may not make sense, it is a motive as to why you kill people. You shout names at somebody. 'What is up, cuz?' That gets you killed or that is threat to kill. If it wasn't so serious, it wouldn't make any sense at all. It is a motive. That is why it is presented."

Based on the obvious relevance of such evidence in this drive-by shooting case, the evidence was plainly admissible. Counsel cannot be deemed incompetent for his failure to engage in an idle act. (People v. Knight (1987) 194 Cal.App.3d 337, 346.)

Defendant further contends Anderson was incompetent for failing to object to the prosecutor's statement in argument as follows: "The defendant apparently says he didn't do it. He wasn't there. So I think you may now be able to save yourself some trouble. Try. Okay? There is no lesser included offense. All you have to determine is whether the defendant was there or not. That is what it boils down to. If you find the defendant was not there, he is not guilty. If you find the defendant was there, he is guilty. [¶] And as far as the other various ramifications back into the personal infliction of great bodily injury and personal use, then you have to find he was there

or -- but actually the guy that perpetrated the crime."

We find no incompetence. Anderson's defense strategy was to establish mistaken identity of the rear passenger. Anderson did not attempt to show that the shooter lacked intent to kill. Anderson thus argued: "It comes down, I guess, to who you want to believe. Do you want to believe Officer Young? I guess you will come back with a verdict of guilty. If you believe [defendant], then you have no choice but to come back with a verdict of not guilty. [Defendant] said he wasn't there. He didn't say those statements that the officer says." Under the facts of this case, defendant has failed to show that Anderson's trial strategy was irrational.

Because we have rejected defendant's claim, we need not address his final contention that prejudice need not be shown when there is a breakdown in the adversarial process.

DISPOSITION

We modify the judgment to add 36 days of custody credit for a total of 373 days of custody credit and 186 days of conduct credit. We affirm the judgment as modified and deny the petition.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

VOGEL, J.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF (S)
CHARLES BLAND, JR.,

CASE NUMBER CV91-4991 Kn(JG)

vs.

DEFENDANT(S)
DIRECTOR, CALIFORNIA
DEPT. OF CORRECTIONS,
ET AL.

NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND THE LODGING OF PROPOSED JUDGMENT

TO: All Parties of Record

William S. Harris
Stewart & Harris
140 E. Colorado Blvd., Ste. 216
Pasadena, CA 91105

Sanjay T. Kumar
Deputy Attorney General
300 S. Spring St., Ste. 500
Los Angeles, CA 90013

You are hereby notified that pursuant to the Local Rules Governing Duties of Magistrate Judges, the Magistrate Judge's report and recommendation has been filed and a proposed judgment has been lodged on September 24, 1992, copies of which are attached.

Any party having objections to the report and recommendation and the proposed judgment shall, not later than October 8, 1992, file and serve a written statement of objections with points and authorities in support thereof before the Honorable R.J. Groh, Jr.,

U.S. Magistrate Judge. No response to any objections will be received.

Failure to do so object within the time limit specified shall be deemed as consent to the recommendation and a waiver of any appeal. Upon receipt of objections, or upon lapse of the time for filing objections, the case will be submitted to the District Court Judge for disposition. Following entry of judgment, all motion or other matters in the case shall be filed to be considered and determined by the District Court Judge.

The Report and Recommendation of Magistrate Judge is not a final appealable order. A Notice of Appeal pursuant to Federal Rules of Appellate Procedure 4(a)(1) should not be filed until entry of the District Court's judgment.

Dated: September 25, 1992

CLERK,
UNITED STATES DISTRICT COURT

By /s/ Liz Padilla
Deputy Clerk

NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND THE LODGING OF PROPOSED JUDGMENT

M-51 (02/91)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES BLAND, JR., Petitioner, v. DIRECTOR, CALIF. DEPT. OF CORRECTIONS, et al., Respondents.	NO. CV 91-4991-Kn(JG) REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE (State Habeas Corpus)

This Report and Recommendation is submitted to the Honorable David V. Kenyon, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

Petitioner, an inmate in state custody, was convicted of attempted murder and assault with a firearm in the Superior Court of Los Angeles County. The California Court of Appeal affirmed the judgment (subject to a slight modification of the sentence), and the California Supreme Court denied his petition for review. (Return, Exhs. A, B, C.) In this petition for writ of habeas corpus, petitioner challenges his conviction on the grounds (1) that he was denied his constitutional right to discharge his attorney, and (2) that he was denied effective assistance of trial counsel in several respects. An evidentiary hearing was ordered with respect to one of those claims --counsel's failure to seek suppression of inculpatory statements made by defendant following his

allegedly unlawful arrest.

FINDINGS OF FACT

The underlying facts are undisputed. On February 4, 1987, three men in a blue and white Suzuki Jeep drove past a group of people standing at a bus stop. The men in the vehicle were members of one street gang (the Cripps), and some of the persons at the bus stop were members of a rival gang (the Bloods). One of the men in the vehicle fired several shots into the group, wounding a bystander.[1] A number of eyewitnesses identified the driver of the vehicle as Dazarri Waller and the shooter as Shawn Gascon (also spelled Gaskin). The third occupant was later identified as Darren Wannamaker. (Affidavit of Det. Enyeart in support of application for search warrant, pp. 11-12;[2] testimony of Detective Stephen Young).

Inglewood Police Detectives Russell Enyeart and Stephen Young were dispatched to the scene of the crime where they met Officer Rick Clark who had obtained statements from various eyewitnesses. (Enyeart Aff. pp. 10, 20-28.) On the strength of these statements,

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1. This summary is derived from the testimony of Thomas McGhee, one of the intended victims of the shooting. (Reporter's Transcript (R.T.), 31-36.)

2. The application, search warrant, return, and supporting papers (including the warrants for the arrests of Shawn Gascon and Dazarri Waller are attachments to the Notice of Filing, dated April 2, 1992.)

warrants were issued for the arrests of Waller and Gascon. Gascon waived his right to remain silent. He told the officers that he had not been in the vehicle. He said that he had received a telephone call from "Darren" (Wannamaker), who said that he (Wannamaker) and petitioner were riding in Waller's Suzuki and were accosted by bottle-throwing Bloods; that they circled into an alley behind the Bloods and from that position petitioner fired into the group. Gascon was acquainted with petitioner and identified his photograph in the high school year book. Gascon offered to assist the detectives in proving his innocence and did so by permitting the officers to monitor and tape a telephone call made in response to a call from petitioner. During that conversation petitioner stated that he was glad that Gascon had not been arrested because he (Gascon) had not been involved in the shooting. Petitioner also stated he had to get away from his house but wouldn't say where he was going. Petitioner also stated that "None of those slobs [slang for Bloods] got plugged," that the only person shot was a Mexican. (Enyeart Affidavit; Testimony of Detective Young.)

The officers then spoke to Waller, a minor, who initially refused to give a statement. However, he subsequently volunteered that petitioner and Wannamaker were riding with him in his vehicle and had an encounter with some Bloods, and that petitioner had fired at them with a handgun. Wallen then drove

petitioner to his home at 2037 West Imperial Highway where he exited the car with the gun in his possession. Id. Neither Waller nor Gascon knew the other was in custody at the time their statements were made. (Testimony of Detective Young.)

Detective Enyeart then applied for and obtained, from Judge Charles R. Scarlet, a warrant to search petitioner's home for the gun and ammunition. (See note 2, above.) The search was conducted on February 5, but neither Bland nor the gun was found. While no warrant was obtained for petitioner's arrest, the officers immediately initiated a search for him and petitioner was arrested at the home of a relative about 2 weeks later. Following his arrest, petitioner gave a statement to the police in which he admitted having obtained the gun from his house and being in the vehicle, but he denied that he had fired the gun. (R.T. 59-61.)[3/]

DISCUSSION

1. Petitioner was not denied the right to discharge his attorney.

A defendant's constitutional rights may be violated if he is compelled to "undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict." Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); United States v. Williams, 594 F.2d

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3. Facts relevant to the other issues are included in the discussion below.

1258 (9th Cir. 1979) (per curiam). Courts are required to investigate a defendant's expressed dissatisfaction with counsel, and, under appropriate circumstances, it may be necessary to provide a substitute lawyer to preserve the constitutional right to effective counsel. Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982), cert. denied, 461 U.S. 916, 103 S.Ct. 1896 (1983). However, the defendant bears the responsibility of bringing his dissatisfaction before the court. U.S. v. Robinson, 913 F.2d 712, 716 (9th Cir. 1990), cert. denied, 111 S.Ct. 1006 (1991). This was not done in the instant case.

Petitioner's father retained attorney Ronald Anderson to defend him at some point after the preliminary hearing. (Pet. p. 6.)[4/] Petitioner alleges that his father attempted to have Anderson removed when Anderson failed to appear when the case was called for trial on July 20, 1987, the initial trial date. Id. But this was not an expression of dissatisfaction by petitioner. While his father may have been paying the bill, he lacked standing to compel his discharge. Moreover, when Anderson appeared with petitioner later that same day, petitioner gave no indication of dissatisfaction; indeed, he waived his speedy trial rights so that Anderson would have additional time to prepare for trial. (Augmented Reporter's Transcript (Aug.R.T.), 3-4.)[5/]

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4. Petitioner was apparently represented by a public defender through the preliminary hearing. (Clerk's Transcript (C.T.), 1.)

5. Anderson's failure to appear when the case was first called

Petitioner also alleges that he personally "asked the judge to remove Anderson and appoint the Public Defender after he failed to appear on 8/14/87." (Pet. p. 6.) The record does not support that assertion.[6/] Indeed, there is nothing whatever in the record to suggest that petitioner ever told the trial court he was dissatisfied with his attorney, even though he had numerous opportunities to do so. The first such occasion was on July 20, 1987, as noted above. The second opportunity arose on August 10, 1987, the rescheduled trial date, when petitioner appeared without Anderson. The judge asked him why his attorney was not present, and petitioner responded -- "I believe he is under the impression he is no longer on the case." When the judge asked petitioner how Anderson could get that impression, petitioner simply said, "I don't know." (Aug.R.T. 6.)

The trial was continued to August 14. On that date, Anderson appeared and told the court he was not ready for trial; that the file had only been returned to him the previous Saturday. When the court asked his intention, Anderson stated: "It is my understanding that the

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was also explained. He said he understood that someone else was to appear; that petitioner's father had told him a month earlier that new counsel was being retained and they had picked up the file. However, petitioner raised no objection to the continuation of the trial or Anderson's representation. (Aug.R.T. 3-4.)

6. Anderson did not fail to appear on August 14. (Aug.R.T. 8-9.)

defendant is wishing that another attorney represent him. I guess I have a motion to be relieved as counsel and he wants a public defender to represent him." The judge responded: "He may wish that, but that is not going to happen." Petitioner was present during that discussion but said nothing. (Aug.R.T. 9.) The court then granted the request for postponement of the trial (to September 11) to give Anderson time to prepare, and petitioner again waived his speedy trial rights without objection. Id.[7]

I do not regard Anderson's oblique statement that petitioner was "wishing" for another attorney or his "guess" that he had a motion to be relieved to be a sufficient declaration of actual dissatisfaction on the part of petitioner. Counsel's remark is vague and equivocal. It seems far more likely to reflect the uncertainty and confusion he must have felt due to the activities of petitioner's father and the withdrawal and restoration of the file -- matters as to which petitioner had professed ignorance just four days earlier.[8]

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7. A trial was subsequently postponed a number of times for a variety of reasons without objection by petitioner or notation of any dissatisfaction with counsel. (See Minute Orders, C.T. 98-107.) Defendant did refuse to waive a speedy trial time on October 23, 1987, when a substitute attorney stood in for Anderson. (C.T. 103.) This was the only instance of Anderson's failure to appear in person after August 10, 1987. (C.T. 96-107.)

8. It might also be noted that the return of the file to Anderson just prior to the August 14 hearing appears to be

So viewed, the trial judge's response was not inappropriate. The right to substitute counsel is not absolute. Williams, 594 F.2d at 1260. In particular, a court is entitled to take into account the timeliness of the request and its likely effect on the trial date. United States v. Mills, 597 F.2d 693, 700 (9th Cir. 1979). Here, nearly six months had passed since petitioner's arrest and a second postponement was required to allow time to prepare. Both of those postponements, moreover, were traceable to the elder Bland's interference, as Anderson had given up the file (and presumably his own efforts at preparation) sometime before July 20th at the father's request. Against that background, the trial court could easily have seen a renewed attempt to substitute counsel as a desire to delay the trial as long as possible.

For these reasons, petitioner's claim that he was denied the right to discharge his attorney must be rejected, and the petition dismissed in that respect.[9/]

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completely inconsistent with a present intention to discharge him.

9. In further support of this conclusion, I approve and adopt the analysis of the California Court of Appeal in its rejection of petitioner's claim.

> "The equivocal, uncertain nature of Anderson's statement did not properly bring the issue of substitution of counsel to the trial court's attention. Moreover, even assuming the request was unequivocal, it was not timely. While defendant may have wished to secure other counsel about four weeks before the original July 20 trial date, he failed to do so. By the time Anderson said he 'guess[ed]' he had a motion to substitute counsel, the second August 10

2. Petitioner was not denied effective assistance of counsel.

The petition asserts five separate instances of ineffective assistance: (1) failure to seek suppression of fruits of unlawful arrest; (2) failure to investigate and offer the exculpatory testimony of percipient witnesses[10]; (3) failure to object to gang evidence; (4) failure to object to improper summation; and, (5) abandonment of petitioner at sentencing.

A defendant does not have a constitutionally protected right to be represent on the basis of an alleged denial of effective counsel, absent a showing that

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trial date had also passed. Both delays can be attributed in large part to the fact that defendant, after leading Anderson to believe he was not on the case, had failed to tell Anderson that he was back on the case. Anderson was not given back the file until a few days before the August 14 hearing. In this context, Anderson's vague statement, that he 'guess[ed]' he had a motion to substitute counsel after two scheduled trial dates had lapsed, could hardly be considered a timely motion. The trial court's retort aptly reflected its frustration and disapproval of defendant's transparent attempt to arbitrarily substitute counsel to cause even further delay." (Ret.Exh. A, pp. 21-22.)

10. This and the other contentions are factually flawed in that no supporting facts or explanation are provided. Such conclusory allegations are plainly inadequate to meet petitioner's initial burden on this claim. See Spillers v. Lockhart, 802 F.2d 1007, 1010 (8th Cir. 1986). O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990), cert. denied, 111 S.Ct. 986 (1991). Nevertheless, I will consider the issues as formulated by the respondents.

(1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the outcome of the case would have been different if counsel had met the requisite standard of competence. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). The burden upon petitioner is a heavy one -- he must overcome a "strong presumption" that counsel's representation fell within the "wide range of reasonable professional assistance." Id. at 689, 104 S.Ct. at 2065. It is against this background that petitioner's claims must be considered.

(a) Failure to suppress evidence allegedly obtained through illegal arrest.

Petitioner contends that his attorney was ineffective in that he failed to challenge the legal sufficiency of petitioner's arrest and the admissibility of his subsequent statements to the police. He argues that the police had no probable cause to arrest him, and, therefore, that his subsequent inculpatory statements should have been suppressed.

This claim is without merit, as the evidence elicited at the evidentiary hearing not only demonstrated that probable cause for the arrest did exist, but also that the equivalent probable cause determination had previously been made by the state court in connection with the search of petitioner's residence.[11/] The testimony of

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11. The search warrant application was, of course, available

Detective Young at the evidentiary hearing and the affidavit of Detective Enyeart in support of the search warrant application were virtually identical in content and mutually corroborating. That evidence shows that, notwithstanding the eyewitness' identification of Shawn Gascon as the shooter:

(1) One of the occupants of the vehicle, Darren Wannamaker, called Gascon and admitted to having been in the Suzuki and having seen petitioner fire the shots. (These statements were against Wannamaker's penal interests. Gascon's account of the conversation was corroborated by the evidence below).

(2) Petitioner acknowledged, in a taped telephone conversation shortly after the crime, that Gascon was not in the vehicle and was not involved in the shooting. In that conversation petitioner also claimed knowledge of intimate details about the incident.

He also spoke of the necessity "to get out of there" and declined to discuss his plans on phone.

(3) In an independent statement to the police shortly after the crime, Waller stated, contrary to his penal interest, that he was driving the Suzuki when petitioner fired the shots into the crowd of Bloods.

(4) Despite concerted efforts to locate him, petitioner evaded arrest for fourteen days during which he did not return home.

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to defense counsel.

Probable cause to arrest exists when there is a reasonable probability that a crime has been committed and that the defendant committed it. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991), cert. denied, 112 S.Ct 2995 (1992). ("Probable cause to arrest exists when 'under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.' (citation omitted.)") That standard is plainly satisfied here. It follows that defense counsel committed no professional error in failing to seek suppression of defendant's post-arrest statement.

(b) Failure to investigate and present potentially exculpatory evidence.

Here petitioner contends that his trial attorney was incompetent because he failed to interview the eyewitnesses who had identified Gascon as the shooter and failed to call them to testify at trial. The first flaw in this claim is that there is nothing in the record to show that attorney Anderson did not interview some or all of those witnesses. As that is a matter not within petitioner's personal knowledge, his unsupported, conclusory allegation cannot be credited.

Secondly, it is evident from the discussion in Part 2(a) above, that the decision not to present the testimony of those witnesses would not, in any event, have been outside the range of appropriate professional assistance.

Counsel could reasonably have concluded that it would have been pointless, and perhaps counterproductive, to present the testimony of those witnesses in the face of (1) petitioner's admission to the officers that it was actually he, and not Gascon, in the car with Waller and Wannamaker (R.T. 59-61), (2) petitioner's recorded statement to Gascon that Gascon was not involved, and (3) Waller's statements to the police, and Wannamaker's testimony at the preliminary hearing (C.T. 23-26), confirming that petitioner was the third person in the vehicle.[12/]

It is, I think, also clear from the foregoing discussion that petitioner was not prejudiced by the failure to put on the testimony of the other eyewitnesses. Given Wannamaker's testimony identifying petitioner as the shooter (R.T. 106), petitioner's own admission to the police that he was in the vehicle (R.T. 59-60), and his own trial testimony that Gascon "didn't have anything to do with it" (R.T. 87), it is extremely unlikely that a reasonable jury would have concluded that it was Gascon, and not petitioner, in the vehicle.

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12. Furthermore, one of those eyewitnesses, Thomas McGhee, had already withdrawn from his original statement to the police, and testified at the preliminary hearing that he could not identify Gascon as the gunman. He explained that the others at the bus stop said it was Gascon, but that he did not see the face of the gunman. (C.T. 63.) McGhee testified similarly at trial. ("Everybody was saying Shawn [Gascon] was in the jeep." (R.T. 40.)) Thus, this proof was before the jury, which was free to give it such weight as it chose.

(c) Failure to object to evidence of gang membership.

Detective Steven Young testified at trial about gangs and gang rivalries to show a motive for the shooting. (R.T. 45-52, 128-31, 144.) Under California law, evidence of gang membership is admissible to show motive. People v. Frausto, 135 Cal. App. 3d 129, 140, 185 Cal. Rptr. 314, 321 (1982). Counsel can hardly be found inadequate for not objecting to such evidence.

(d) Failure to object to remarks made during prosecutor's closing argument.

During closing arguments the prosecuting attorney told the jury, in essence, that if they did not believe petitioner's story (that he was not present at the time of the shooting; R.T. 80), then they should find him guilty.[13] Contrary to petitioner's suggestion, the prosecutor was not attempting to mislead the jury into thinking that petitioner could be found guilty just by being present at the scene of the crime. There were only three persons in the car, and the identity of only one of those persons, the shooter, was in dispute. The

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13. The relevant portion of the argument is as follows: "The Defendant apparently says he didn't do it. He wasn't there. So, I think you may now be able to save yourself some trouble. Try. Okay? There is no lesser included offense. All you have to determine is whether the defendant was there or not. That is what it boils down to. If you find the defendant was not there, he is not guilty." (R.T. 142.)

question before the jury was clearly whether petitioner was or was not the third person in the car. Viewing the argument and the evidence as a whole, and considering the thorough jury instructions which followed the argument,[14] the jury could not have understood that the defendant could be found guilty merely because he was present in the vicinity at the time of the shooting. Counsel's failure to object to the prosecutor's argument was not improper.

(e) Failure to appear at the sentencing hearing.

Attorney Anderson did not appear for petitioner's sentencing. However, another attorney was appointed to represent petitioner and petitioner does not contend that that representation was ineffective or that his interests were prejudiced by the substitution of counsel. While Anderson's failure to appear is not lightly to be excused, the appointment of a substitute lawyer effectively nullifies the argument that petitioner was denied effective representation at sentencing.

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Court issue an Order:

(1) approving and adopting this Report and Recommendation; and,

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14. One of the instructions given to the jury was as follows: "Mere presence at the scene of the crime which does not assist the commission of the crime does not amount to aiding and abetting." (R.T. 163.)

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(2) directing that Judgment be entered denying and dismissing the petition for writ of habeas corpus with prejudice.[15]

DATED: This 24th day of September, 1992.

/s/

R.J. GROH, JR.
United States Magistrate Judge
United States District Judge

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15. Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file objections with the above-named District Judge within 10 days (20 days, if in custody), as provided in Rule 3.1.04 and .05 of the Local Rules Governing Duties of Magistrate Judges and Fed.R.Civ.P. 72. The failure of either party to object to a particular finding of fact or conclusion of law may constitute a waiver of the right to contest the matter on appeal. Smith v. Frank, 923 F.2d 139, 141 (9th Cir. 1991); Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991). A notice of appeal pursuant to the Federal Rules of Appellate Procedure should not be filed until Judgment has been entered.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES BLAND, JR., Petitioner, v. DIRECTOR, CALIF. DEPT. OF CORRECTIONS, et al., Respondents.	NO. CV 91-4991-Kn(JG) JUDGMENT

IT IS HEREBY ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: _____, 1992.

_____
DAVID V. KENYON
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Charles Bland, Jr. Plaintiff, v. Dir., Cal. Dept. of Corrections, and the Attorney Gen. of Calif. Defendants.	CV 91-4991-Kn(JG) ORDER Re: Plaintiff's Habeas Corpus Petition

INTRODUCTION[1]

Petitioner, an inmate in state custody, was convicted of attempted murder and assault with a firearm in the Superior Court of Los Angeles County. The California Court of Appeal affirmed the judgment (subject to a slight modification of the sentence), and the California Supreme Court denied his petition for review.[2] (Return, Exhs. A, B, C.) In this petition for writ of habeas corpus, petitioner

1. This Court has adopted from Magistrate Judge Groh's Report and Recommendation the text of the Introduction and Undisputed Facts. This Court respectfully disagrees, however, with Magistrate Judge Groh's legal analysis, and therefore declines to adopt the remainder of his Report and Recommendation.

2. Mosk, J., dissented from the denial.

challenges his conviction on the grounds that (1) he was denied his constitutional right to discharge his counsel, and (2) he was denied effective assistance of trial counsel in several respects. The Magistrate Judge conducted an evidentiary hearing with respect to one of these claims -- counsel's failure to seek suppression of inculpatory statements made by petitioner following his allegedly unlawful arrest.

BACKGROUND FACTS

On February 4, 1987, three men in a blue and white Suzuki Jeep drove past a group of people standing at a bus stop. The men in the vehicle were members of one street gang (the Cripps), and some of the persons at the bus stop were members of a rival gang (the Bloods). One of the men in the vehicle fired several shots into the group, wounding a bystander.[3/] A number of eyewitnesses identified the driver of the vehicle as Dazarri Waller and the shooter as Shawn Gascon (also spelled Gaskin). The third occupant was later identified as Darren Wannamaker. (Affidavit of Det. Enyeart in support of application for search warrant, pp. 11-2;[4/] testimony of Det. Stephen Young).

Inglewood Police Detectives Russell Enyeart and Stephen Young were dispatched to the scene of the crime where they met Officer Rick Clark who had obtained

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3. This summary is derived from the testimony of Thomas McGhee, one of the intended victims of the shooting. (Reporter's Transcript (R.T.), 31-36).

4. The application, search warrant, return and supporting papers (including the warrants for the arrests of Shawn Gascon and Dazarri Waller) are attachments to the Notice of Filing, dated April 2, 1992.

statements from various eyewitnesses. (Enyeart Aff. pp. 10, 20-28.) On the strength of these statements, warrants were issued for the arrests of Waller and Gascon. Gascon waived his right to remain silent. He told the officers that he had not been in the vehicle. He said that he had received a phone call from "Darren" (Wannamaker), who said that he (Wannamaker) and petitioner were riding in Waller's Suzuki and were accosted by bottle-throwing Bloods; that they circled into an alley behind the Bloods and from that position petitioner fired into the group. Gascon was acquainted with petitioner and identified his photograph in the high school year book. Gascon offered to assist the detectives in proving his innocence and did so by permitting the officers to monitor and tape a telephone call made in response to a call from petitioner. During that conversation petitioner stated that he was glad that Gascon had not been arrested because he (Gascon) had not been involved in the shooting. Petitioner also stated that he had to get away from his house but wouldn't say where he was going. Petitioner also stated that "None of those slobs [slang for Bloods] got plugged," that the only person shot was a Mexican. (Enyeart Affidavit; Testimony of Detective Young.)[5/]

The officers then spoke to Waller, a minor, who initially refused to give a statement. However, he

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5. During the state's case-in-chief, evidentiary objections were raised to the introduction of the tape or testimony as to the substance of the conversation recorded thereon (between petitioner and Gascon). (RT 53-57.) The prosecutor agreed to withdraw all reference to the tape. (RT 57-58.)

However, on cross-examination, petitioner agreed with the prosecutor about the essential substance of this phone conversation with Gascon. (RT 85-87.) Ultimately, the tape was played in front of the jury over defense counsel's objection. (RT 97-99.)

subsequently volunteered that petitioner and Wannamaker were riding with him in his vehicle and had an encounter with some Bloods, and that petitioner had fired at them with a handgun. Waller then drove petitioner to his home at 2307 West Imperial Highway where he exited the car with the gun in his possession. Id. Neither Waller no Gascon knew the other was in custody at the time their statements were made. (Testimony of Detective Young.)

Detective Enyeart then applied for and obtained, from Judge Charles R. Scarlet, a warrant to search petitioner's home for the gun and ammunition. (See note 4, above.) The search was conducted on February 5, but neither petitioner nor the gun was found. While no warrant was obtained for petitioner's arrest, the officers immediately initiated a search for him. Petitioner was arrested at the home of a relative about 2 weeks later. Following his arrest, petitioner gave a statement to the police. According to Detective Young, Petitioner admitted having obtained the gun from his house and being in the vehicle, but he denied that he had fired the gun. (R.T. 59-61.) Petitioner ultimately took the stand at trial and denied that he made any such admissions to Officer Young. (R.T. 77-78.)[6/]

LEGAL RIGHT AT ISSUE

Petitioner's first ground for relief is "denial of right to discharge retained counsel." Petition for Writ of Habeas Corpus at p. 6.

> In Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970), [the Ninth Circuit] held that to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with

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6. Facts relevant to the other issues are discussed below.

> whom he has become embroiled prior to trial in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever. Id. at 1170. Thus, the state court's summary denial of a defendant's motion for new counsel without further inquiry violated the Sixth Amendment. The trial court must take the time to conduct such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern. Id.

Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982).

Petitioner recites the following facts in support of his Sixth Amendment claim:

> My father hired Ronald Anderson, who was later disbarred for his handling of this case, and paid him a retainer. Anderson did not interview the witnesses, including several teachers, who said that the guilty person was someone else. He did not come to see me other than briefly to pressure me to plead guilty. He failed to show up in court on several occasions. On July 20, 1987, my father asked the trial judge to remove Anderson after he failed to appear in Court. I asked the judge to remove Anderson and appoint the Public Defender after he [Anderson] failed to appear on 8/14/87. This request was denied. Trial began on 10/30/87.

Petition for Writ at p. 6.

Review of a trial court's decision to deny substitution of counsel is for abuse of discretion. U.S. v. Torres-Rodriguez, 930 F.2d 1375, 1380 (9th Cir. 1991); U.S. v. Walker, 915 F.2d 480, 482 (9th Cir. 1990). Three factors

must be considered: (1) the timeliness of defendant's request; (2) the adequacy of the court's inquiry into defendant's complaint; and (3) whether the conflict between the defendant and his counsel was so great that it resulted in a total lack of communication preventing an adequate defense. Id. (citing U.S. v. Mills, 597 F.2d 693, 700 (9th Cir. 1979)).[7] Before embarking on the three-factor inquiry, however, the Court must determine that in fact a motion or request for substitute counsel was made. U.S. v. Robinson, 913 F.2d 712, 716 (9th Cir. 1990).

SUPPLEMENTAL FACTS PERTINENT TO PETITIONER'S SIXTH AMENDMENT CLAIM[8]

Petitioner was represented in preliminary matters in March, 1987 by the Public Defender. On May 7, Ronald Anderson, a private attorney retained by Petitioner's father to represent his son, was substituted for the Public Defender. The Public Defender's investigation file -- which contained the police report detailing the statements of several disinterested eyewitnesses who claimed that Shawn Gascon (and not petitioner) was the shooter -- was turned

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7. The Mills factors are invoked by the Ninth Circuit not only in direct appeals but also on review of habeas corpus petitions. Hudson v. Rushen, 696 F.2d 826, 829 (9th Cir. 1982).

8. The Supplemental Facts that follow are taken from the following sources: (1) the unreported opinion of the California Court of Appeals (attached as Exhbit A to respondent's return); (2) the petition for state habeas corpus relief and the attached declarations (Exhibit A, B). Respondent had not disputed the facts stated in the declarations of petitioner and his father. To the extent these supplemental allegations are not inconsistent with the record, this Court assumes them to be true for purposes of this motion.

over to attorney Anderson. Petition for State Habeas Corpus Relief, Exhibits A, C.

Trial was set for July 20th.[9] In June, Petitioner's father contacted Anderson to inquire as to why he had not contacted any of these eyewitnesses. In response, Anderson asked for more money. (Petitioner's father had paid a $1,000 retainer and had agreed to pay an additional $1,000 before trial and $100 per week until the full fee of $3,000 was paid.) Petitioner's father, in turn, asked for and received Petitioner's file, and told Anderson he was going to hire a new lawyer. However, Petitioner's father discovered he could not afford a new lawyer. Petitioner's father thereafter attempted to telephone Anderson without success, and went to Anderson's office several times during business hours but found the office to be closed. See generally Decl. of Charles Bland, Sr.

On the morning of July 20 (the trial date), Anderson failed to appear in Court. Petitioner's father appeared and, according to his submitted declaration, requested on his son's behalf that the judge take Anderson off the case.[10] Anderson appeared that afternoon (after petitioner's father informed him that the judge desired his presence), and explained:

> I did not appear this morning. Approximately four weeks ago I was advised by Mr. Bland, Sr., that he was retaining another attorney. They gave me a name. They came up and

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9. Supplemental Volume of Reporter's Transcript on Appeal (68 pages, dated Dec. 1, 1989) (S.V.) at 1-2.

10. The transcript does not reflect what, if anything, was said at the morning session on July 20, by either petitioner's father, or the judge in response. Only the afternoon session has been transcribed. (S.V. 3.).

> picked up the contents of the file. I was under the understanding that someone would appear today. I got a call this morning, I guess, advising me they did not retain counsel. That is the status of the case at this time.

(S.V. 3.) The Court then inquired if Mr. Anderson was ready for trial. Mr. Anderson replied in the negative, and the judge continued the trial to August 10, 1987. (Id. 3-5.)

On August 10, 1987, the case was again called for trial, and Anderson again failed to appear. When asked if he could explain Mr. Anderson's absence, petitioner responded: "No. I believe he is under the impression that he is no longer on the case." The Court stated: "How did he get that impression? I didn't relieve him." Petitioner replied that he did not know. The Court issued a bench warrant for Mr. Anderson's arrest. (Id. 6-7.)

Anderson appeared in Court on August 14 and apologized to the Court that he had miscalendared the trial date. The bench warrant was recalled and quashed. The following colloquy ensued:

> COURT: Are you ready for trial?
>
> ANDERSON: No, Your Honor. First of all, I am trailing on another matter for trial here on Tuesday.
>
> COURT: What is your pleasure on this matter?
>
> ANDERSON: It is my understanding that the defendant is wishing that another attorney represent him. I guess I have a motion to be relieved as counsel, and he wants a Public Defender to represent him.
>
> COURT: He may wish that, but that is not going to happen.

ANDERSON: This is a matter in which the defendant had advised me they had another attorney. They did not retain that attorney, and I just received the file on Saturday. I am surely not ready to go.

COURT: When do you want it to go over to?

ANDERSON: September the 12th.

The court ordered the trial re-set to September 12. (Id. 8-10.)

On September 11, the trial was continued to give Mr. Anderson further time to prepare. (Clerk's Transcript (C.T.) 98.) On September 25, Mr. Anderson obtained a continuance to October 9 on the grounds that he was engaged in another court. (C.T. 99.) After several more continuances on various motions by the prosecution and defense, trial finally commenced on October 30, 1987, with Mr. Anderson representing petitioner. (C.T. 100-108.)

According to Petitioner, Anderson spent only about 15 or 20 minutes with him before trial. In the limited time Anderson did spend with petitioner, his focus (according to petitioner) was on convincing petitioner to plead guilty. Anderson first asked petitioner to take the stand during trial without preparing him or going over his testimony. Declaration of Charles Bland, Jr.

Petitioner was convicted of attempted murder and assault with a firearm. Mr. Anderson failed to appear at sentencing. It was learned that his telephone had been disconnected. A Public Defender was appointed,[11] and the matter was continued. Petitioner -- a teenager at the time

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11. The Public Defender's office declared a conflict of interest. Private counsel was appointed and represented petitioner at sentencing.

-- was ultimately sentenced to a term of life imprisonment plus seven years.

Petitioner's father complained to the State Bar and gave deposition testimony about attorney Anderson's conduct in this case. Anderson was disbarred.[12/]

LEGAL ANALYSIS

A. Did Petitioner Request Substitute Counsel?

The Court finds the statement "I guess I have a motion to be relieved as counsel, and he wants a Public Defender to represent him" to be crystal-clear. But even if there is an argument to be made that the statement, taken in context, was equivocal,[13/] there can be no doubt

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12. This Court has reviewed a copy of Anderson's disbarment proceedings. Anderson was disbarred as a result of his own default; he failed to answer the charges against him. Anderson's failure to show up at petitioner's sentencing was one of several unanswered charges of malpractice and ethical violations listed in the State Bar's complaint. In the Matter of the disbarment of Ronald Etherdige Anderson (Case No. 87-0-10932 (88-0-172LA)) (Supreme Court of the State of California, January 3, 1990).

13. Although this is what the California Court of Appeals concluded, this Court's reading of the record reveals that the events leading up to this statement -- which were known to the trial judge -- suggest quite clearly that petitioner was (and had reason to be) dissatisfied with his retained counsel, and concomitantly was likely interested in substituting in appointed counsel. In short, petitioner's retained counsel had failed to show up in court on two scheduled occasions, and the trial judge had felt the need to issue a bench warrant to ensure his presence.

Moreover, as discussed above, petitioner's father claims to have made a direct request to the judge that a public defender be appointed at the July 20th hearing.

that the judge understood it for what it was when he replied: "He may wish that, but that is not going to happen." It is simply illogical to argue that a request which a judge specifically denies was nevertheless sufficiently equivocal to excuse the judge's duty of pursuing it further.

Unless directly questioned by the judge, a criminal defendant speaks solely through his attorney. Indeed, it is the attorney's ethical obligation vigilantly to protect the rights of his client. The law also imposes upon the judge certain duties in safeguarding the particularly sacrosanct right to counsel implicated in this case. Any miscommunication between counsel and the judge therefore must be resolved in favor of petitioner. This Court concludes that a motion for substitution of counsel was made.

B. The Mills 3-Part Test

1. Timeliness

"It is within the trial judge's discretion to deny a motion to substitute made during or on the eve of trial if the substitution would require a continuance." U.S. v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986) (citing U.S. v. Williams, 594 F.2d 1258, 1260-1261 (9th Cir. 1979)[14/] and U.S. v. Michelson, 559 F.2d 567, 572 (9th Cir. 1977)[15/]).

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14. In Williams, however, the court relied on Brown v. Craven, supra, and overturned a trial court's summary denials of two timely motions by defendant to substitute counsel. 594 F.2d at 1260-1261.

15. In Michelson, the trial court's denial of defendant's request that his attorney be removed and a continuance granted was upheld. The reviewing court found that (unlike in the present case) the trial judge had: (1) carefully considered the defendant's request; (2)

When defendant's motion for new counsel was brought to the trial court's attention on August 14th (as discussed above), two trial dates had already passed (the original July 20th date and the re-schedule August 10th date). It is possible to infer that the trial judge may have summarily denied petitioner's motion to substitute counsel because he believed it to be a further dilatory tactic. In light of this belief, the trial judge may have thought that he was acting within his discretion.

There are several problems with this line of argument. First, under the circumstances of this case, it was the trial court's obligation to make the record clear that his denial of petitioner's motion was predicated on timeliness or delay grounds. Compare Torres-Rodriguez, supra, 930 F.2d at 1381 (Court's review "hampered because the trial court made absolutely no inquiry into the defendant's request for substitution" and thus there was "no certain means of establishing the likelihood of delay") and Walker, supra, 915 F.2d at 482-483 (untimeliness not dispositive where "district court did not discuss the lack of timeliness or any potential delay posed by [defendant's] motion, nor did it indicate that timeliness was a consideration underlying its denial of the motion") with United States v. Pruitt, 719 F.2d 975, 978 (9th Cir. 1983) (denial of motion to continue on morning of trial to substitute counsel upheld where "trial judge expressly found that appellant's counsel was 'very competent' and that the

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considered defense counsel's performance and concluded that "he had worked diligently and actively on his client's behalf"; and, (3) "sought to allay defendant's fears" about a particular legal issue. 559 F.2d at 571-572.

motion was made for purposes of delay").[16]/

Second, it is far from clear that Petitioner's desire to have new counsel appointed (expressed by his attorney of record) should have been thwarted even if the trial court might reasonably have concluded that Petitioner's father was improperly disrupting the orderly processes of justice.[17]/ This is especially true if petitioner's father did in fact make a direct request that new counsel be appointed for his son (as he contends). The trial judge quite probably rejected that request because it did not come from the Petitioner himself (or his attorney of record).[18]/

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16. As discussed in greater detail below, there is nothing in the record to otherwise assure this Court that petitioner was not denied his Sixth Amendment right. Compare McClendon, supra, 782 F.2d at 786, 789 (upholding refusal to grant continuance to allow substitution of counsel on timeliness grounds where (1) defendant explained to judge his concern that counsel stuttered and was not thorough in his investigation of the case, (2) judge responded that he had known counsel for nine years and counsel did not stutter, and (3) "record reveal[ed] no lack of communication between [defendant] and counsel and show[ed] that counsel was vigorous and well-prepared in his argument").

17. Constructing the facts in respondent's favor, the worst that can be said is that if Attorney Anderson was legitimately unprepared and confused about his representation of petitioner, fault lay with petitioner's father. It was he who had originally retained Attorney Anderson; it was he who had then taken the file back from Anderson while seeking other counsel; and it was he who (according to Anderson) returned petitioner's file to Anderson only days before the scheduled trial.

18. This Court's view of the record, however, is that the person primarily responsible for the delays in this case was attorney Anderson. It was he who failed to show up for several court dates (the father apparently always was present) and it was he who failed diligently (if at all) to pursue his ethical responsibility of preparing for trial as

Finally, granting (or at least considering) Petitioner's motion to substitute counsel at the August 14 appearance simply would not have caused an unjustifiable delay on the "eve of trial." Moments before rejecting Petitioner's request that a Public Defender be appointed, attorney Anderson had informed the judge that he was not prepared to go forward. A few seconds later, the trial judge granted a one month continuance to allow attorney Anderson to prerpare.[19/] (Anderson had just represented to the judge that he had only received the file a few days earlier.) Thus, substituting in a Public Defender at that point would have neither delayed a trial about to commence (no jury had been empaneled) nor undermined the preparation of counsel (since counsel clearly had not yet begun to prepare and the Public Defender would have had ample opportunity to get up to speed).

2. Adequacy of the Court's Inquiry

The trial judge conducted absolutely no inquiry to discover the reasons underlying petitioner's discontent. Thus, "because the trial judge foreclosed all explanations of any kind regarding the motion to substitute," this Court has "no way of knowing the nature of [Petitioner's] complaint with his . . . counsel." Torres-Rodriguez, supra, 930 F.2d at 1381. Lack on any inquiry whatsoever is inadequate as a matter of law. Id. (abuse of discretion to deny request for substitution of counsel "without permitting any showing regarding the likelihood of delay, the nature

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counsel of record.

19. In fact, the trial did not begin until October 30, two and one half months after the judge denied the motion to substitute counsel.

of [defendant's] complaint, or the degree to which the dispute with his attorney may have prevented an effective defense"); U.S. v. Garcia, 924 F.2d 925, 926 (9th Cir. 1991) (quoting Brown v. Craven, supra, 686 F.2d at 829) ("A trial court may not summarily refuse to allow substitution of attorneys, but must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.'").[20/]

3. Extent of Conflict

Conducting no inquiry at all is especially troubling because for all practical purposes it forecloses any meaningful review of whether the conflict was so great that it "resulted in a total lack of communication preventing an adequate defense." Walker, supra, 915 F.2d at 483.[21/] As in Torres-Rodriguez, supra, the record is woefully "deficient" as to this third consideration; moreover, "[w]hat little the record does suggest is decidedly not reassuring." 930 F.2d at 1381.

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20. Even when the court does make some limited inquiry -- which it did not in this case -- it may nevertheless be found insufficient. Walker, supra, 915 F.2d at 483 (Court inquiry inadequate where it was limited to issue of competence of defendant's counsel and failed to explore "nature and extent of conflict between defendant and counsel"). Compare Hudson v. Rushen, 686 F.2d 826, 831 (9th Cir. 1982) (inquiry found adequate where record reveals that "court convened a session out of the presence of the jury . . . , invited defendant to make a statement, listened to defendant's reasons for desiring new counsel, and found them to be without merit"); Mills, supra, 597 F.2d at 700 ("Court held adequate and fair hearing" on defendant's motion).

21. The same may be said of the first factor -- timeliness or delay -- which similarly can not meaningfully be reviewed without some articulation by the trial judge of his reasoning.

By the time of the August 14 appearance, Petitioner's counsel had twice failed to appear in court on scheduled trial dates. The trial judge had been forced to issue a bench warrant to compel counsel's presence. Petitioner's father claims that he had made a direct request for appointment of a new attorney. During the August 14 appearance, petitioner's counsel suggested unequivocally that Petitioner remained concerned with obtaining substitute court-appointed counsel. "The circumstances at least called for further exploration"; instead, "[a]ll attempts of all parties to address the question of substitution were cut off." Torres-Rodriguez, 930 F.2d at 1381.

C. The Result

This Court concludes that the state court's summary denial of petitioner's request that a public defender be appointed, without any inquiry whatsoever as to the reasons for the request and the consequences of granting or refusing it, violated petitioner's Sixth Amendment right to counsel of his choice. Under the circumstances of this case, the Court need proceed no further in order to grant petitioner's requested relief; the case law imposes no requirement that specific prejudice be shown.

"[T]he right to counsel of choice, like the right to self-representation, is premised on respect for the individual and similarly is either respected or denied irrespective of the harmlessness or prejudicial nature of the error." Wilson v. Mintzes, 761 F.2d 275, 286 (7th Cir. 1985) (citing McKasle v. Wiggins, 465 U.S. 168, 198 n.6 (1984) (White, J. dissenting)). Thus, "[t]he majority of courts have held that prejudice need not be shown when an accused is

denied the right to counsel of his choice." Id. at 285.[22]

The Ninth Circuit stated long ago that "where there has been complete disregard of the defendant's right to choose his own counsel, prejudice will be assumed." Releford v. United States, 288 F.2d 298, 302 (9th Cir. 1961). More recently, in an analogous context, the Ninth Circuit held that where the question is not whether the trial court "properly denied a continuance," but "what inquiry a trial court must make before ruling on a continuance motion," and where "a trial court does not attempt to ascertain the length of continuance necessary . . . ," "the defendant has been deprived his or her right to counsel [and t]he conviction must be reversed, irrespective of any showing of prejudice." Slappy v. Morris, 649 F.2d 718, 723 (9th Cir. 1981), reversed on other grounds, 461 U.S. 1 (1983).[23]

Nevertheless, as petitioner's ineffective assistance of counsel arguments reveal, there is ample evidence in the record to support the conclusion that the suspect relationship between petitioner and his counsel "hindered the presentation of [petitioner's] defense." Garcia, supra, 924 F.2d at 927 (no finding of defective defense where

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22. Accord People v. Ortiz, 51 Cal.3d 975, 988 (1990) ("Just as when a court improperly denies a defendant's motion to represent himself or to replace counsel because of a conflict of interest, or when an indigent criminal defendant is denied counsel altogether, we must presume prejudice when an indigent criminal defendant is forced to proceed with a retained attorney whom he has consistently, and in a timely manner, sought to discharge in favor of the public defender or other court-appointed counsel.") (internal citations omitted).

23. Justices Brennan and Marshall, concurring, found "persuasive" the Ninth Circuit's reasoning on the "no prejudice required" rule, and cited, among other cases, the Ninth Circuit's earlier decision in Releford v. U.S., supra. 461 U.S. at 26-28.

defendant's attorney "testified to the significant amount of preparation he invested in [defendant's case]" and "record reflects that he defended [defendant] fully and forcefully").

Petitioner states that defense counsel spent less than one half hour with Petitioner before trial (and the vast majority of that time was taken up with trying to convince petitioner to plead guilty), did not decide to put him on the stand until the middle of trial, and did not prepare the Defendant before he testified in his own defense. While these facts alone are strong evidence that the relationship between petitioner and his counsel may have hindered the presentation of an effective defense, the record reveals quite specifically how this lack of adequate (or even minimal) preparation may have inured to petitioner's detriment.

During the prosecution's case-in-chief, defense counsel used cross-examination to raise the possibility of mistaken identity, arguing that it was quite possible that the shooter had been one Shawn Gascon.[24/] Yet, according to petitioner, counsel failed to interview at least five

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24. During cross-examination of the victim of the assault (Thomas McGhee), attorney Anderson elicited testimony to the effect that McGhee had earlier identified Shawn Gascon (and not petitioner) as the shooter. (RT 40.) Anderson also elicited from McGhee a description of Gascon, which he then attempted to show matched the description of the assailant. (RT 39-41.) Anderson later elicited information from the arresting officer to show that petitioner's appearance at the time of his arrest did not match that of the shooter. (RT 67.) Defense counsel also brought out testimony from petitioner as to the similarity of the appearance of Shawn Gascon to that of the assailant. (RT 79-80.)

The closing arguments of both the prosecution and defense further demonstrate that the central question presented for the jury's decision was whether petitioner's theory -- that he was not present in the vehicle at the time of the shooting -- was credible. (RT 140, 142.)

disinterested percipient witnesses who had told the police that the shooter was not petitioner but was indeed Shawn Gascon.[25/]

Petitioner's testimony in his own defense once he took the stand was obviously inconsistent with his attorney's earlier efforts to point the finger at Gascon. Petitioner denied ever telling Det. Young that he was present in the jeep when the shooting took place. (RT 77-78.) Petitioner also directly denied both shooting the victim and being present in the jeep when the shots were fired. (RT 80.) Petitioner did admit, however, that in a phone call he had stated to Gascon that he was glad the police were not pursuing him (Gascon) because petitioner knew that he (Gascon) was not present in the jeep. (RT 87.) In short, petitioner's theory was that the shooter was neither himself nor Gascon.[26/]

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25. See Declarations of Charles Bland Sr. and Jr.

26. In assessing the alleged failure to interview witnesses who had identified Gascon as the shooter, the California Court of Appeals declined to "fault Anderson for failing to pursue a theory which his own client twice denied during a recorded telephone conversation and post-arrest questioning." Return at 43.

This analysis is troubling. The fact is that at trial (at least during the government's case-in-chief), Anderson did pursue the theory that his client had twice denied (i.e., that Gascon was the shooter). See n.24, supra. And, the record strongly suggests that the reason the "Gascon" theory was pursued was that Anderson was so terribly unprepared before trial that he was unaware of the substance of one or all of the following: the taped phone conversation between petitioner and Gaskin, the February 18, 1987 post-arrest conversation between petitioner and Det. Young, and the version of events petitioner intended to convey when he took the stand in his own defense.

Specifically, the first indication in the record of the taped conversation is at the 1538.5 motion on the day of trial. (RT 16-17;

With respect to a jury instruction given regarding petitioner's testimony in his own defense, the California Court of Appeals found that while there had been legal error (i.e., the record did not support the giving of an instruction on drawing adverse inferences from defendant's failure to explain or deny evidence against him), defendant was not prejudiced thereby. Return, Exh. A., pp.34-39.

During the reading of the jury instructions by the judge, petitioner felt compelled to interrupt to state: "Your Honor, I have evidence in my defense that was not presented. I would like to ask why." (RT 172.) The record reflects only that the trial judge responded by instructing the jury to disregard petitioner's statements. Id.

In sum, as stated above, the record amply supports the conclusion that the suspect relationship between petitioner and his counsel "hindered the presentation of [petitioner's] defense." Garcia, supra, 924 F.2d at 927. Not

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18-19.) At trial, defense counsel attempted to exclude evidence of the telephone conversation, and succeeded (temporarily). Had petitioner not taken the stand in his own defense (which decision was apparently made during trial), the prosecution would not have been able to introduce the tape conversation at all during cross-examination.

As to petitioner's alleged confession to Det. Young (that he was present in the Jeep but did not fire the shots), again, it does not appear that defense counsel was aware until the very day of trial that Det. Young would so testify. (RT 1-10.)

Finally, the stark inconsistencies between the theory of the case pursued by Anderson during the government's case-in-chief (that Gascon did it), the theory suggested by the taped conversation and petitioner's statements to Det. Young (that petitioner was present but Gascon was not the shooter), and the theory put forth by petitioner once he took the stand (that petitioner was not present and Gascon was not the shooter), confirm petitioner's sworn declaration that he and his attorney had little if any substantive discussion prior to trial about whether petitioner would take the stand and, if so, what he would say.

only did the trial judge fail to make any inquiry as to the nature of the conflict between petitioner and his counsel, but the trial record raises serious questions about the acts and omissions of defense counsel and the apparent lack of cooperation between attorney and client.

CONCLUSION

The above discussion demonstrates that petitioner is in state custody in violation of the right to counsel of his choice guaranteed by the Sixth Amendment of the United States Constitution.[27] Petitioner's request for a writ of habeas corpus is GRANTED. California authorities shall have sixty (60) days from the signing of this Order to grant petitioner a new trial with retained or appointed counsel,

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27. The fact that the state courts were not presented with the Ninth Circuit authority relied upon herein does not raise any exhaustion problems. Hudson v. Rushen, 686 F.2d at 829-830 ("The exhaustion requirement does not bar admission to the federal courts until the state courts have explicitly considered every relevant federal case.").

Moreover, this Court has reviewed the controlling state court cases, and believes they are consistent with the federal cases and dictate the same outcome. South v. Superior Court, 188 Cal.App.3d 1055, 1060 (1986) (quoting People v. Barnes, 146 Cal.App.3d 663, 667 (1983) (citing People v. Marsden, 2 Cal.3d 118, 124 (1970))) ("What is required of a trial court when a request for substitution is made is that the court allow the defendant to explain his reasons and then exercise judicial discretion."); People v. Lau, 177 Cal.App.3d 473, 477 n.3, 478-479 (1986); People v. Stevens, 156 Cal.App.3d 1119, 1128 (1984). See also People v. Courts, 37 Cal.3d 784, 790-791 (1985) (quoting People v. Byoune, 65 C.2d 345, 346-347 (1966)) (relied on in the instant case by the state court of appeals) ("right to counsel of one's choice 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.'").

as is appropriate and as petitioner wishes. Otherwise, petitioner is to be RELEASED from state custody. 28 U.S.C. §2243; Hilton v. Braunskill, 107 S.Ct. 2113, 2118 (1987).

IT IS SO ORDERED.
DATED: April 21, 1993

(Sgd) DAVID V. KENYON

DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES BLAND, JR.	)	No. 93-55766
	)	
Petitioner-Appellee,	)	D.C. No. CV 91-04991-Kn(VT
	)	
v.	)	
	)	ORDER
CALIFORNIA DEPARTMENT OF CORRECTIONS; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,	)	
	)	
Respondents-Appellants.	)	

Before: BRIGHT,* WIGGINS, and T.G. NELSON, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing. Judge Wiggins and Judge Nelson vote to reject the suggestion for rehearing en banc, and Judge Bright so recommends.

*Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX I

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES BLAND, JR.	)	No. 93-55766
	)	
Petitioner-Appellee,	)	D.C. No. CV
	)	91-04991-
v.	)	Kn(VT
	)	
CALIFORNIA DEPARTMENT OF CORRECTIONS; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,	)	ORDER
	)	
Respondents-Appellants.	)	

Before: BRIGHT,* WIGGINS, and T.G. NELSON, Circuit Judges.

Appellant's "Motion for Stay of Issuance of the Mandate Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure Current Stay of Mandate to Expire July 22, 1994" filed July 21, 1994 is GRANTED. The mandate is stayed for a period of thirty days from the date of this order.

*Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

SUPREME COURT, U.S.
FILED
SEP 20 1994
OFFICE OF THE CLERK

No. 94-0328

In The

Supreme Court of the United States

October Term, 1994

DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

CHARLES BLAND, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, by failing to seek post-trial relief in the district court under Rules 59 and 60 of the Federal Rules of Civil Procedure, waived the right to dispute factual findings by the district court based upon uncontroverted declarations in the record.

PARTIES TO THE PROCEEDING BELOW

The present petitioner is the Director, California Department of Corrections, who was one of the respondents-appellants in the Court of Appeals.

Respondent Charles Bland, Jr., was the petitioner-appellee in the Court of Appeals.

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STATEMENT OF THE CASE

Respondent Charles Bland, Jr. ("Bland") was convicted of attempted murder in the Los Angeles County Superior Court and sentenced to life plus seven years. He was represented at trial by Ronald Anderson, an attorney who was later disbarred based in part upon his dereliction towards Bland. Bland had moved to discharge Anderson prior to the trial on August 14, 1987. The motion was summarily denied by the trial court without inquiry into the substance of Bland's grievances. [Cert. Petn., App. B, Pages 6 through 8.][1]

Bland filed a direct appeal on the discharge issue and a state habeas petition alleging ineffective assistance of counsel. In support of the habeas petition, Bland submitted two declarations of himself and his father which described some of Anderson's derelictions. [Cert. Petn., App. C, Pages 31-37.] Those declarations were uncontroverted. Bland's direct appeal and habeas proceeding were consolidated for consideration by the California Court of Appeal. [Cert. Petn., App. D.] The Court of Appeal affirmed Bland's conviction, modified his sentence, and denied his habeas petition in an unpublished opinion. [Cert. Petn., App. C.]

Bland then sought review in the California Supreme Court. The petition for review incorporated the uncontroverted declarations of Bland and his father. That petition was denied.

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[1] The present certiorari petition is abbreviated "Cert. Petn." The appendix to the certiorari petition is abbreviated "App."

In a federal habeas petition, Bland renewed his claim that his Sixth Amendment right to discharge Anderson had been abridged. A magistrate judge, after conducting an evidentiary hearing on the issue of probable cause to arrest, issued a report and recommendation that Bland's petition be denied and the action dismissed. [Cert. Petn., App. F.]

United States District Judge David V. Kenyon rejected the magistrate's report and recommendation. In a 21-page order, Judge Kenyon recounted the history of the proceedings and concluded that Bland's right to discharge Anderson had indeed been abridged on August 14, 1987. In Footnote 8 of that order, Judge Kenyon stated that the facts contained in the two uncontroverted declarations would be assumed true to the extent they were not inconsistent with the balance of the record. [Cert. Petn., App. G, Page 6.]

Petitioner (respondent in the district court) did not seek an evidentiary hearing or other post-trial relief in the district court challenging the truth of the uncontroverted declarations.

The Ninth Circuit affirmed. [Cert. Petn., App. A, Page 3316.] In rejecting petitioner's claim that it had no "opportunity to refute" the uncontroverted declarations, the Ninth Circuit observed that:

> "The California Court of Appeal considered both declarations when it addressed Bland's ineffective assistance of counsel claim in the consolidated habeas proceeding, but nonetheless denied relief. Even though these facts are contained in the decision of Court of Appeal and were drawn directly from the declarations,

> the State did not dispute those factual allegations in the district court. Nor did it request an evidentiary hearing to resolve any disputes. To the extent the State had a dispute with the facts as stated in the decision of the Court of Appeal, it should have raised it in the district court. Accordingly, we find that the State waived this issue." [Cert. Petn., App. A, Page 3304.]

The Ninth Circuit also noted that petitioner did not assert that the declarations were untrue, only that petitioner had lacked an "opportunity to dispute" the declarations. [*Ibid.*, Page 3305.]

REASONS FOR DENYING THE WRIT

The decision below is correct. There is no conflict among the circuits; indeed, none is alleged. The Ninth Circuit's decision, furthermore, does not announce a new constitutional rule of criminal procedure under *Teague v. Lane*, 489 U.S. 288, 299 (1989). The Ninth Circuit correctly determined that petitioner simply waived a factual dispute in the district court. No substantial issue is presented.

I.

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER WAIVED ANY DISPUTE WITH THE FACTS AS FOUND BY THE DISTRICT COURT BY FAILING TO SEEK AVAILABLE POST-TRIAL RELIEF IN THAT FORUM.

The crux of petitioner's claim is that petitioner was unfairly surprised by a factual finding of the district

court. The district court stated that it would assume the truth of two uncontroverted declarations submitted by Bland and his father in the state proceedings, to the extent those declarations were not inconsistent with the balance of the record. That factual finding was contained in Footnote 8 of the district court's order. [Cert. Petn., App. G, Page 6.] Petitioner now claims that it had no "opportunity to refute" the factual allegations contained in the those declarations.

A. Petitioner Failed To Seek Available Post-Trial Relief In The District Court.

If petitioner disagreed with any of the district court's factual findings, including findings based upon two uncontroverted declarations, petitioner should have sought post-trial relief in the district court under Rule 59 and Rule 60 of the Federal Rules of Civil Procedure.

Under Rule 59(a)(2), petitioner could have sought a new trial in the district court based on equity considerations. Any claim of unfair surprise would have been cognizable under that provision. Under Rule 59(e), furthermore, petitioner could have moved to alter or amend the district court judgment. The Rule 59(e) procedure is applicable to habeas corpus proceedings. *See Skagerberg v. State of Oklahoma*, 797 F.2d 881, 883 (10th Cir. 1986) (habeas petitioner's Rule 59(e) motion denied in the district court).

Post-trial relief was also available to petitioner under Rule 60 of the Federal Rules of Civil Procedure. Under Rule 60(b)(1), relief was available for alleged "surprise" due to any of the district court's factual findings. Under

Rule 60(b)(6), furthermore, relief was available to petitioner based upon any alleged irregularity in the district court's fact-finding procedures. *Cf. United States v. Kralmann*, 3 F.R.D. 473, 475 (D. Ky. 1943) (dictum that a party "surprised at the trial" is "amply protected" by Rules 59(a) and 60(b) of the Federal Rules of Civil Procedure).

Petitioner was armed with an arsenal of procedures to raise its point in the district court. Petitioner did not avail itself of those procedures. If petitioner disagreed with the factual content of the uncontroverted state declarations, assumed to be true by the district court, petitioner should have sought a post-trial evidentiary hearing in the district court. Petitioner's assertion in the Ninth Circuit that it had no "opportunity to refute those factual allegations" is erroneous as a matter of law. [Cert. Petn., App. A, Page 3303.] Petitioner had ample opportunity to refute the declarations, but it did not even attempt to do so. (To this day petitioner does not state what parts of the state declarations, if any, are factually incorrect.)

Post-trial relief under Rules 59 and 60 of the Federal Rules of Civil Procedure was available in this habeas proceeding. Rule 11 of the Rules Governing § 2254 Cases provides as follows:

> "The Federal Rules of Civil Procedure, to the extent they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules."

The advisory committee notes on Rule 11 provide in pertinent part as follows:

> "Rule 11 extends this approach to allow the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides that they are appropriate under the circumstances of the particular case. The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms the discretionary power to use their judgment in promoting the ends of justice."

In this case, petitioner did not even ask for post-trial relief under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure. In its certiorari petition, petitioner argues that, "Again no rule governing habeas corpus litigation prior to this point imposed a duty upon a respondent to request an evidentiary hearing or risk a waiver of the disputed factual issue." [Cert. Petn., Page 16.] Although petitioner may not have been under a "duty" to seek available post-trial relief, petitioner acted at its peril in failing to request such relief. The Ninth Circuit correctly determined that "the State waived this issue." [Cert. Petn., App. A, Page 3304.]

B. The Ninth Circuit Decision Does Not Announce A "New Rule" Of Criminal Procedure.

It follows that the decision of the Ninth Circuit announced no "new constitutional rule of criminal procedure" under *Teague v. Lane*, 489 U.S. 288, 299 (1989). The Ninth Circuit's decision is based, instead, upon the "old rule" of waiver.

Petitioner's state habeas procedures do not need to be revamped. If this situation ever arises again, the state should seek available post-trial relief in the district court under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure. Those rules provide "ample protection" against any alleged mistake or surprise in the district court's fact-finding process.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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DATED: September 20, 1994